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REVIEW OF THE EARLY IMPLEMENTATION OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

HEARING

BEFORE THE

SUBCOMMITTEE ON
IMMIGRATION AND REFUGEE AFFAIRS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

REVIEW OF THE EARLY IMPLEMENTATION OF THE IMMIGRATION
REFORM AND CONTROL ACT OF 1986

APRIL 10, 1987

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REVIEW OF THE EARLY IMPLEMENTATION OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

FRIDAY, APRIL 10, 1987

U.S. SENATE,
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE AFFAIRS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:11 a.m., in room SD-226, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Also present: Senators Simpson and Simon.

Staff present: Jerry M. Tinker, staff director; Michael Myers, counsel; Melinda Nielsen, chief clerk; and Richard Day, minority counsel.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. The Subcommittee will come to order.

Today's hearing resumes our continuing oversight of the implementation of the Immigration Reform and Control Act.

As I noted during our first hearing, this major legislation is taking us into some uncharted waters and it is raising serious concerns and fears in the minds of employers and employees alike all across the land.

And the clock is ticking. The time for implementation of the legislation will soon be at hand and the transition period provided by Congress will end. In just 3 weeks, the legalization program will begin, which could involve millions of people. Four weeks later, the sweeping provisions of employer sanctions will take effect. These major programs could literally affect the lives of every person residing in the United States, citizen and alien alike.

We can understand this morning that there are many questions in the minds of many people, as well as fears, because even we who helped fashion the legislation have questions on the proposed regulations to implement the Act and deep concerns whether they reflect congressional intent and the objectives of the law.

Regrettably, for most people the answers have been slow in coming and the information incomplete. Although the Immigration Service moved swiftly to propose its regulations, we have yet to hear conclusively from the other departments involved. And the major public education campaign authorized by Congress to inform the American people on the requirements of the new law was launched only 2 days ago—5 long months after the bill was signed into law, and just weeks before it takes effect.

So we need today to have some answers. We need to know whether, on day zero, when all the provisions of the law take effect, will the American people know what to do, what is expected of them? Will information reach employers on how they can follow the law by taking a few simple steps? Will they be told not to fire employees on their payroll before the law was signed, and how to avoid discriminating against new employees simply because they may look foreign?

We are only weeks away from beginning the legalization program. Are we prepared? Is there sufficient funding in the pipeline to assure that the doors will be open at the voluntary agencies and others who will be providing preliminary counselling to applicants?

Is the Immigration Service prepared to adjust some of the proposed regulations to assure that the legalization program is implemented in as flexible and generous a fashion as possible?

Finally, I remain troubled by the Department of Justice's attempt to construct the law's anti-discrimination provisions by inserting into the proposed regulations an intent standard that is contrary to the law's explicit language and legislative history.

I would hope that the Justice Department would understand that that legislation was drafted by the Judiciary Committee, which has had a long and continuing concern about civil rights, and those particular provisions were drafted by individuals that understand the difference between an intent standard and an effect standard, and for them to distort, grossly distort both specific language and the intention of those drafters I think extends the role of the Justice Department in an unwarranted way.

I know there are questions which are in the minds of our first panel of witnesses who represent some of the people who are most directly affected by the new law during its early implementation, and that is why we have invited them to testify here, first to raise the questions and concerns that are clearly out there so that our final panel, the Commissioner of Immigration Service and representatives of the Department of Justice can respond.

WELCOME OF WITNESSES

I would like to welcome Monsignor DiMarzio, who is Director of Migration and Refugee Service for the U.S. Catholic Conference, who reflects the concerns of the voluntary agencies; James Paras, Chairman of the Labor Relations Council of the U.S. Chamber of Commerce, who will speak to the concerns of the business community; Mr. Wade Henderson, Associate Director of the American Civil Liberties Union, who will speak to the anti-discrimination provisions; and Charles Kamasaki, who is Director of Policy Analysis for the National Council of La Raza who represents the concerns of the American Hispanic community; and, finally, Dolores Huerta, speaking on behalf of the United Farm Workers.

I recognize the Senator from Wyoming.

OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Mr. Chairman, I thank you. I certainly commend you for holding these hearings on the implementation of the immigration bill. It is so important that we carefully follow the drafting of the regulations.

I do think that the INS did an excellent job of presenting draft regulations to the people of the United States and the interested groups who are so deeply involved here. I have not seen that happen before in my 8 years here, where they have said, "here, try these, look at them, then we will go back to the running of the period of comment and then we will do the final regs." I think the INS is to be commended for that. I am very pleased, and I know you are, that yesterday the contract was issued, I think for $10.7 million, for the public information of letting the people of the United States know what is required of them. In this, the implementation activities, and surely this legislation that you have been so deeply involved in, too, is very broad and very all-encompassing, and many U.S. citizens are going to be surprised at the documentation they are going to be required to present on that coming day in 1987. It is an equally broad group who are speaking of congressional intent and I do not think we have ever had more ability to determine congressional intent than in this bill.

We are all here, the INS Commissioner is here, he knows the cast of characters and, of course, we are those best able to determine if congressional intent has been followed—and these hearings give us an opportunity to do that.

I am familiar with the concern. I visited with Nick yesterday and some others and learned of his concerns. He is always very authentic in his expression of those concerns, and I look forward to hearing the testimony of this panel and the response of the Commissioner a little later in the day.

Thank you, Mr. Chairman.

Senator KENNEDY. I would ask that the opening statement of our colleague, Senator Simon, be printed at this point in the record.

[Prepared statement of Senator Simon follows:]

PREPARED STATEMENT OF SENATOR SIMON

Mr. Chairman, I want to thank you for agreeing to convene another oversight hearing on the implementation of the Immigration Reform and Control Act. I will be interested to hear from the witnesses here today and their views on how immigration reform, be it the commencement of legalization on May 5 or reaction to employer sanctions or implementation of agricultural provisions, is faring around the country. Too often we here in Washington, DC, are remiss in not hearing what impact the laws we pass or regulations we write have on our Nation.

Frankly, Mr. Chairman, the things we are beginning to hear concern by deeply. For example, the Chicago Sun-Times reported about a 40-year-old woman whose husband and five children, like her, live in the United States illegally. However, she was deported in 1982, and therefore cannot show she has lived here continuously since before 1982. Her family can apply for legalization; she cannot. Fortunately, the Chicago District INS Director has stated that family unification should be the No. 1 principle of the legalization program: "If a person in the family has a legal claim (to amnesty), then we should unify them here." But will that be the rule in other INS districts? Must it take new legislation such as that introduced by Edward Roybal for common sense and decency and the unification of families to take place? I hope the Commissioner can look at the regulation one more time and come up with a more reasonable rule.

I would also like to call attention to the provision which requires all those who "recruit or refer for a fee" to verify work authorization. I am concerned that this will create an inordinate amount of extra work for agencies who do hire employees but only provide the initial contact. I have already written to the Commissioner about this and hope that a common sense solution can be found.

Another concern I want to raise relates to the continuous physical presence requirement. As presently drafted, the regulations would expect that an undocumented individual should have gone to the local INS office last December and reported in to tell an officer he was to visit family in Mexico at Christmas but that we would return for the legalization program. Strange as that might sound, the exemption for brief, innocent and casual absences in the regulations requires that to have taken place. Before many legalization applicants are deterred by this provision, I hope the INS can improve upon this. I have raised this issue before and suggested an alternative which I hope you will consider.

Finally, I am troubled by the prospect that the qualified designated entities we are depending on to work hand and hand with the legalization offices may be overburdened early in the process. Catholic churches reportedly have received 400,000 applications already and we have not yet reached the beginning of legalization. Perhaps if we extend the period of worker self-authorization from September 1 to a much later date we will take off the pressure to file for legalization at the start of the process. Otherwise, I wonder if we will not be discouraging some of these legalization entities because of the great numbers they will be required to serve without enough fiscal or preparatory support.

These are my concerns and I hope the witnesses will enlighten us on these and other critical issues.

Senator KENNEDY. Monsignor DiMarzio, you are recognized.

A PANEL CONSISTING OF REV. MSGR. NICHOLAS DiMARZIO, EXECUTIVE DIRECTOR, MIGRATION AND REFUGEE SERVICES, U.S. CATHOLIC CONFERENCE; JAMES C. PARAS, CHAIRMAN, LABOR RELATIONS COUNCIL, U.S. CHAMBER OF COMMERCE; WADE J. HENDERSON, ASSOCIATE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION; CHARLES K. KAMASAKI, DIRECTOR OF POLICY ANALYSIS, NATIONAL COUNCIL OF LA RAZA; AND DOLORES HUERTA, UNITED FARM WORKERS

Monsignor DIMARZIO. Thank you. I am Monsignor Nicholas DiMarzio, Director of Migration and Refugee Services——

Senator KENNEDY. We are going to try and keep the presentations down to 5 minutes. We will include the statements in the record so we can get to the questions.

Monsignor DIMARZIO. I am prepared to summarize the statement.

I offer the statement today not only in behalf of the United States Catholic Conference but also on behalf of other voluntary agencies that will be involved in the legalization program.

I am the chairman of our ad hoc committee within the InterAction organization of the voluntary agencies, and I have dedicated a lot of time to seeing how we can assist in the implementation of this bill.

We as agencies were opposed to some of the aspects of the Immigration Reform and Control Act. Now that the Act is law, we are very much concerned that those people for whom the law was intended will be the beneficiaries of the benefits of this law and you can be assured of our complete cooperation to this end.

The basic premise that the legalization provisions of the law are a remedial mechanism. These statutes have really intended to rectify a social problem, that of undocumented migration and its impact on our labor market and our other social systems in this country.

Remediation requires an inclusive interpretation. We are trying to fix something that has gone awry. We need to use the tool of legislation to the fullest extent and we have some serious concerns regarding the implementation of the law as we understand it, because we see in the proposed regulations a great difficulties in being inclusive. They seem to have an accumulative effect as to be exclusive of many individuals and this is basically our concern. We will attempt to assist, but we want to assist people to take advantage of the law, not to be excluded by the law.

MAINTAINING FAMILY UNITY UNDER LEGISLATION

One of our principal concerns is that of maintaining the family unity of those who come to apply for legalization. Again, family unity is one of the underlying principles of our immigration law and it is certainly key to our society also.

A key decision that needs to be faced by someone who wishes to come out of the shadows to benefit from this law will be their family status. The fact is that the prevailing pattern of migration, i.e. undocumented migration has been such that first, probably, the male head of the family comes and he has come probably before 1982, and in the subsequent years we have the wife and children coming to follow. Those people will not qualify for the benefits of legalization.

My own research in the New York metropolitan area is the subject of my doctoral dissertation, and about one-third of the families that were interviewed—over 1,500 families—would be excluded under this situation because they had come subsequent to 1982, so we would have a situation where someone who wishes to come forward to benefit from legalization would have to think twice about exposing their family to detection.

Although the law is clear on the confidentiality visions, this provision is not so clear in the minds of the undocumented. Being able to give them assurance that those with a dependent spouse and/or children will not be put in jeopardy is not an easy thing to do.

"DOCKET CONTROL" IS SOLUTION

We think there is a solution to this problem. There is an administrative precedent for this kind of resolution and it has been used in the *Silva* v. *Levi* class, when the incorrectly allocated Cuban visas were given to the Western Hemisphere nationals, especially the Mexican nationals. Deferred status or docket control was afforded to these dependent individuals, dependent spouses and children and they were given work authorization until the principal beneficiary could petition for them, and this is the same thing we would recommend in this case. There is an administrative solution, there is precedent for it and eventually these individuals would be able to quality for permanent residency status when their spouses would be able to petition.

There is a problem certainly with the Mexican nationals because the quota is backed up, but they would probably become citizens first and then be able to petition for their immediate family relatives. This is a key issue, and if the law is to work we need to address this.

I have a letter that Chairman Rodino of the House Judiciary Committee sent to Mr. Meese, yesterday, and he recommends the same type of resolution, where he—I will quote the letter, I would like to submit it for the record, if possible—he says in his letter:

> Although the law does not specifically authorize derivative legalization status for family members who do not qualify, neither does it prevent INS from exercising its discretion to allow immediate family members of qualifying aliens to remain in the United States pending the availability of immigrant visas.

I think the Chairman of the House Committee has a good resolution to this issue.

DOCUMENTATION PROBLEMS

There are several other issues I will summarize briefly, as my time is running out. There are certain issues of documentation that are very vexing. It is going to be very difficult for most people to meet all of these qualifications of documentation. None of them are in themselves impossible, but the cumulative effect of many difficult regulations regarding documentation will exclude many people.

We certainly are concerned about the fees that are being charged by INS to the individuals. We realize that the program as is set up is now being funded completely from these fees, yet there is no provision for waiving these fees as there are with the fees that will be charged or donations accepted by the qualified designated entities. We think there is a difference in this whole issue. We as voluntary agencies are not that satisfied with the cooperative agreement that has been offered us. We really have not had the serious dialogue that will be necessary to really make this program work.

For example, we look at our administrative costs. The administrative costs offered by the INS is about 6 percent. In most social service agencies, an administrative cost, and really not just soft administration but here we are talking about program administration, would come to about 20 percent, so we are already short in the offer that we have lacks 14 percent.

There is a difficulty in trying to make this work and we really are looking for more dialogue with INS and we would encourage the committee to ask for that dialogue between the voluntary agencies, the QDEs and INS.

Senator **Kennedy**. You can have about another minute.

EMPLOYMENT AUTHORIZATION

Monsignor **DiMarzio**. Okay. There are just two final points I would like to bring up. First, on employment authorization, we would like to really laud the INS for the self-certification that they have come up with in regard to the employment authorization. It does solve the major problem. Unfortunately, the solution does not go far enough because it is only until September 1st that people can self-certify. The difficulty will be that we will have a crunch at that time of people trying to get in before that time and we are not sure we are going to be able to help in handling all those applications. We need to see how we can extend this either at this point or at least have an extension possible in the law before we get to September lst.

Also, another major concern are the seasonal agricultural workers. That will be addressed by another panel member, but we as voluntary agencies are trying to do all that we can to assist in this particular program. It is one of the most difficult ones to administer, and not having the issue resolved completely will lead to the most deserving of the undocumented, our farm workers, not being able to take advantage of the law.

Thank you very much.

[The prepared statement of Monsignor DiMarzio follows:]

TESTIMONY OF

REVEREND MONSIGNOR NICHOLAS DIMARZIO
EXECUTIVE DIRECTOR, MIGRATION AND REFUGEE SERVICES

ON BEHALF OF THE

UNITED STATES CATHOLIC CONFERENCE

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY

on

OVERSIGHT OF THE IMPLEMENTATION OF THE IMMIGRATION
REFORM AND CONTROL ACT OF 1986

APRIL 10, 1987

Mr. Chairman, my name is Msgr. Nicholas DiMarzio, and I am director of Migration and Refugee Services of the United States Catholic Conference. Institutionally, we have been providing counseling and other services to immigrants and refugees in this country for over 60 years. In addition to our national office here in Washington, we have four regional immigration offices, which now have legalization assistance components. We will also be serving as the national coordinating agency for approximately 100 diocesan legalization programs that have been or are in the process of being established throughout the country.

Issues concerning U.S. immigration policy and immigrants' rights have become increasingly important to the Catholic Conference. Although we consistently opposed some aspects of the Immigration Reform and Control Act of 1986, as the various versions of the legislation were being debated by Congress, now that it has become law we have resolved to do our best to assist those whom Congress intended to be beneficiaries through the vehicle of legalization. We greatly appreciate this opportunity to share some of our concerns about implementation of the legalization program and hope that our comments will convey our judgment that the intent of Congress to make it possible for the undocumented to come out of the shadows will be frustrated, if the course of events does not change dramatically.

The legalization provisions of this immigration bill are clearly remedial in nature. They are intended to rectify a social problem, that of undocumented migration and its impact on our labor market and other social systems. Remedial statutes should be liberally interpreted, are inclusive by nature, and should be implemented in the same spirit.

Our review of the draft and proposed regulations, combined with our conversations with INS policy makers, have given rise to serious concerns as to whether INS will implement these remedial provisions of the statute in the way intended by Congress. I strongly urge the Members of the Subcommittee to join with us in urging INS to reconsider some of their regulations and implementing policies so that those who are clearly eligible for the benefits of legalization have a fair opportunity to apply.

Maintaining Family Units:

It would seem beyond question that family unity is a value we all cherish. For a substantial proportion, perhaps even a majority, of the undocumented population, this threshold issue is the primary criterion upon which the decision to apply for legalization will be made. Typically, members of the same family arrive in this country at different times--first, the male head of household; later, the spouse and perhaps a child; then, not uncommonly children are born in the United States and they are, of course, U.S. citizens. Thus, one spouse may have arrived before the 1982 cut-off, whereas the other would be ineligible to apply, having arrived later.

The dilemma posed to such mixed households was addressed by Commissioner Nelson at a taped, televised news conference in November when he said that ineligible children in such circumstances would "certainly" not be removed if apprehended during the preparation period and perhaps would be "blanketed in," as he put it, in the implementation phase. Recently, however, there seems to have been a retreat from that position, and the INS is now indicating that there will be no national policy on family separation but that it will be up to the district directors at the local level. This will inevitably give rise to disparity in treatment across the country.

Although we are aware of the legislation introduced late last month in the House addressing this problem, i.e., H.R. 1812, there is ample precedent for resolving this administratively. For many years, members of the class in the case of Silva v. Levi were placed on deferred action status and given employment authorization. A similar solution is also available here, whether it be deferred action, a type of extended voluntary departure, or docket control. Assurance needs to be given that families will remain intact if they come forward to apply for legalization.

Documentation Issues:

Another issue arises regarding the applicant who appears at an INS legalization interview and does not prove sufficiently by documentary evidence continuous residence in the United States. The proposed regulations do not provide the applicant an opportunity to return and supplement his case.

Inevitably, there will be borderline cases and differences of opinion on the issue of how much documentation is enough. At a minimum, an applicant should be given an opportunity to return and supplement his/her case. It is standard INS policy in other cases to give an applicant form I-72, which details exactly what documentation is missing. INS should follow this same procedure in its legalization interview. Not only should an applicant be given an opportunity to return and supplement his or her case but the applicant should be specifically instructed on where the documentation in the case is deficient. Specificity is required here so there will be an opportunity on appeal to review the reasonableness of the INS officer's request and whether the applicant made a sufficient showing. Such a notice of intent to deny would provide the element of fairness attendant to other immigration applications with negligible effect on INS operations.

As a voluntary agency, we are very cognizant of the practical reality of the program as proposed. INS has made the requirements for documentation excessively burdensome and restrictive. An example of such restrictiveness is the requirement under the regulations that all documents be submitted in their original form except government records, certain employment records, school records, "or other records maintained by a party other than the applicant." If a document is submitted by a party other than the applicant, such party must certify that the produced document is true and correct and the document must bear the seal and signature of such party or the signature and title of a personal authorized to act on such party's behalf.

We are apprehensive that these requirements will prove to be a significant impediment to the smooth functioning of the legalization process.

Turning over original important documents to INS would seem quite ill-advised given its long history of losing files and documents. Secondly, certified copies of government documents are very difficult to secure. For example, some of the most important documents that can be introduced to prove continuous residency are "certified copies of income tax returns which were filed." Our experience thus far with this requirement indicates that it will take anywhere from six weeks to four months to obtain certified copies of tax returns that have been timely filed, and they cost twenty-five dollars per annual return. Such an exercise is extremely burdensome and unnecessary.

Another practical burden is the employment affidavit that must be submitted in the event that W-2 forms, pay stubs, etc. are not available. This form letter requires the employer to certify a) whether the information was taken from offical company records; b) whether the INS can have access to them, and; c) the employer's willingness to testify. Moreover, if the records are unavailable, an affidavit must be submitted by the employer stating why the records are unavailable.

We feel that this constitutes an extremely onerous burden. Employers who have employed the undocumented will be extremely reluctant to expose their records to the INS or for that matter to any other governmental agency. The party punished by this reluctance will not be the unwilling employer; it will be the otherwise eligible alien who is deprived of a reasonable method of proving that s/he was working in the United States during the statutory period and, therefore, entitled as a matter of right to relief under the Act.

The documentation requirements must be much less technical and stringent if this program is to work. It should be made explicit in the regulations, for example, that sworn declarations under penalty of perjury are to be accorded just as much weight as if they were notarized, impressed with a corporate seal, on letterhead, or were otherwise subject to technical niceties, omission of which could given INS personnel and excuse to refuse to consider otherwise reliable and probative evidence.

Fees:

The issue of INS application fees remains problematic for many of those who apply who are at the lower end of the economic scale. In addition to the $185 application fee and that of other family members, other costs associated with the application include medical examinations, legal fees, photographs, fingerprints, and a variety of other expenses, including possible lost work time to stand in INS lines and track down documents.

The INS application fee, unlike counseling fees charged by voluntary agency legalization assistance immigration offices, cannot be waived. If those who come to us for assistance cannot afford a fee, they pay what they can based on a sliding scale. In many cases, no fee is charged.

In the context of our dissatisfaction with the cooperative agreement that governs the fees that can be charged by qualified designated entities, I was troubled by comments made at this Subcommitttee's hearing on March 24 that the negotiations appeared "unbecoming" for voluntary agencies such as ours. The fact is that some such nonprofit organizations, including affiliates within our system, have decided against becoming designated entities because they could not break even under the terms and restrictions of the cooperative agreement. The effect of this, of course, is that there are fewer places where people can go for assistance at little or not cost, and once again, the likelihood of exploitation by unscrupulous profiteers in the marketplace is increased.

Employment Authorization:

Before I close, I would like to touch on two final issues--employment authorization and special agricultural workers. Although we have seen some improvement in the regulations with respect to the self-certification provisions for purposes of compliance with the employer sanctions provisions, it is essential that the form that employers use explain this procedure, both in the instructions and on the form itself. Such a procedure, nevertheless, does not obviate employment authorization affirmatively granted to those who intend to apply or are in the process of applying for legalization.

It is also essential that there not be anytime during the process in which employees are without the protection of employment authorization before obtaining lawful temporary resident status. The current provision of the proposed regulations ending the self-certification process in September does not solve the problem. Moreover, providing such an initial cut-off in the final regulations with the intent of subsequently extending the date could even exacerbate the problem with regard to those employers who get word of the first date, but not of its extension.

September as a cut-off is particularly problematic for special agricultural workers, given the duration of the growing season and workers' inability to return to the home base state until after the harvest. The most workable solution for all concerned is extension of employment authorization for those applying for legalization through the date of the interview or 90 days beyond the date of the application period, whichever is earlier.

Seasonal Agricultural Workers:

It appears that INS is not in compliance with the statute in requiring special agricultural workers to apply abroad if they were outside the United States at any time after November 6, 1986, the date of enactment. This is the position of the INS even if the applicant can present a nonfrivolous application at the border or has reentered the United States.

Not only does this seem to contravene the explicit language of the statute prohibiting exclusion of such applicants, it also imposes a physical presence requirement that is not based on statute. Although we have objected to the stringent requirements of physical presence and the retroactive application of the advance parole procedure to applicants under § 245A (The General Legalization Program), the application of such a requirement to special agricultural workers is contrary to the understanding of Congress that this a migrant population that travels back and forth across the border. We believe that it is essential for these workers to get into the country to obtain the necessary assistance and documents to complete their applications.

This concludes my remarks. We will be submitting formal comments to INS on the legalization and discrimination regulations and on selected issues relating to the special agricultural workers program. I would be happy to take any questions you may have.

UNITED STATES CATHOLIC CONFERENCE

NATIONAL OFFICE

MIGRATION AND REFUGEE SERVICES

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August 24, 1987

The Honorable Edward M. Kennedy
Chairman
Subcommittee on Immigration and Refugee Affairs
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: **Hearing on Implementation of the Immigration Reform Act**

Dear Senator Kennedy:

Pursuant to the request of your letter of April 22, 1987, I am responding to questions that have arisen following the Subcommittee's Hearing of April 10 on aspects of implementation of the Immigration Reform and Control Act of 1986. As always, we greatly appreciate your concern with the fair and efficient administration of our immigration laws.

I. **Question: The Catholic Conference will obviously be the preeminent actor in the private sector assisting legalization applicants. However, we have received some reports that a number of the Dioceses have reservations about participating in the program as "qualified designated entities." What are the reasons for this? Are there reasonable and feasible steps consistent with the statute which the Immigration and Naturalization service could take to assure their participation?**

Answer: Some of the Dioceses have had reservations about participating as qualified designated entities and, in some cases, opted not to participate as such. The primary reasons for this are insufficient funding and restrictions of the Cooperative Agreement that require not only subsidization but also preclude these non-profit agencies from breaking even in the provision of legalization counseling services. As you know, we and several other organization have written to the Chairman of the Appropriations Committee, Senator Hollings, suggesting that the $16 reimbursement amount is insufficient in light of the substantially greater than expected time it has taken to process each legalization application. We are hopeful that the budget earmarks legalization funds in the fiscal year 1988 appropriation.

II. **Question: Does it really make a difference to the success of the legalization program if they do participate as qualified designated entities, rather than simply performing their normal immigration counselling function?**

Answer: Whether participation in the legalization program as a qualified designated entity is critical depends largely on INS' commitment to the public education campaign and whether such effort incorporates the qualified designated entities into publicity that is developed. Through the course of our discussions with the Service prior to our execution of the Cooperative Agreement, we were assured that there would be a substantial amount of public outreach having the objective of directing potential legalization applicants to the qualified designated entities for assistance.

However, the actual practice of I.N.S. in this regard is very disturbing. Indeed, we have been advised by the Service that the qualified designated entities will not be included in I.N.S. publicity on legalization until October 1. I am sure that you are aware of the virtually complete absence of any public information disseminated by the I.N.S. on legalization to date.

As a consequence, some of our qualified designated entity affiliates are not processing the number of applicants anticipated and are in danger of discontinuing or scaling down operations. Perhaps the most troubling aspect of this situation is the incidence in those same areas of applicants attempting to go through the process without any assistance or seeking assistance from unqualified or unscrupulous notaries or consultants.

III. **Question: I understand there are objections to the definition found in the INS proposed regulations regarding "continuous residence" and "continuous physical presence." What are some examples of persons who would be excluded from legalization under the currently proposed definitions? Do you have a sense of the magnitude of persons otherwise eligible for legalization who may have made a "brief, casual and innocent" trip abroad, but without first getting INS approval?**

Answer: As you know, pursuant to the regulations, anyone who was absent from the United States after January 1, 1982 for 45 continuous days or for 180 days in the aggregate is disqualified from eligibility for legalization unless s/he can demonstrate "emergent reasons" for the extended absence(s). As we said in our Comments to the Proposed Regulations, such a restrictive definition of "resided continuously" as that term is used in section 245A(a)(2) of the Immigration Reform and Control Act of 1986 will operate to exclude from eligibility great numbers of the undocumented to whom we feel Congress intended to extend the benefit of legalization. H.R. Rep. No. 99-682, Pt. 1, 99th Cong., 2d Sess., at 49.

These limitations may be problematic for persons who have had to leave the country to settle a business problem or care for a sick relative unless the I.N.S. is convinced that these are "emergent reasons." It is not yet clear whether the applicant is also going to have to submit documentary evidence to prove or corroborate such reasons. Moreover, the regulations do not recognize that it is common for the undocumented to wait several years before being able to visit family members outside the United States, and overland transportation in itself may require more than 45 days to complete a round trip journey to Latin America.

Another aspect of the definition of "resided continuously" that concerns us is its lack of specificity regarding ineligibility due to a "departure from the United States...based on an order of deportation." Many applicants for legalization have been apprehended at some time or another since they entered the United States prior to 1982. Many such persons were granted voluntary departure, either judicially or administratively. If such individuals did not depart the country prior to the time by which they were so required under such orders, they may have been issued orders of deportation in absentia. Subsequently, perhaps even without knowledge of such an outstanding order of deportation, those same persons may have made brief, casual, and innocent departures to visit relatives abroad. It would be unfortunate, indeed, if the Service deemed such departures to be "self-deportations." In our view, continuous residence should only be deemed to have been interrupted by a departure based on an order of deportation if the applicant left under compulsion of such an order at the expense of the government. Furthermore, it would be very unfortunate if an applicant were accused of fraud in the legalization application because of an unwitting departure from the country and an expectation by the I.N.S. that such person would reflect an affirmative answer on the application to the question of whether s/he had ever departed the United States based on an order of deportation.

Eight C.F.R. §245a.1(f) sets forth the definition of "continuous physical presence" as used in section 245A(a)(3)(A) of the Immigration Reform and Control Act. Generally, this provision requires the continuous physical presence of an applicant from the date of enactment of the law (November 6, 1986) to the date of filing the application for legalization. An exception to this provision exists for absences that are "brief, casual, and innocent." However, this exception, as defined in 8 C.F.R. §245a.1(g), is very limited, *i.e.*, the absences must not have been more than 30 days' duration, a "legitimate emergency or humanitarian" purpose must be demonstrated, and absences after May 1, 1987 must have been approved in advance by the I.N.S. (advance parole).

The term "brief, casual, and innocent" had been interpreted liberally in the past in the determination of whether to suspend deportations until the Supreme Court's decision in *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183 (1984). In section 315(b) of the Immigration Reform and Control Act, however, Congress rejected the *Phinpathya* interpretation and revived the earlier, more liberal standard. The intent of Congress in adopting section 315(b) and using the "brief, casual, and innocent" language in the legalization provisions was, ostensibly, to prevent harsh consequences resulting from absences that do not meaningfully interrupt required residence periods. The strict standard adopted by the I.N.S. in its legalization regulations, therefore, is inconsistent with the intent of Congress as expressed in section 315(b).

The requirement of advance approval by the I.N.S. for trips abroad seems to be incongruous with the necessity of leaving the country on an emergency basis. Moreover, the legality of the I.N.S. requirement of advance parole is questionable given the fact that one's identity must be disclosed to the I.N.S., even before submission of a completed application or adjudication, notwithstanding the fact that the statute safeguards confidentiality "of information furnished pursuant to" an application for legalization. *See* section 245A(c)(5); *cf.*, *Catholic Social Services v. Meese*, 813 F. 2d 1500 (9th Cir. 1987). Unfortunately, we believe that all of these aforementioned technical requirements will operate to disqualify tens of thousands of applicants, particularly those who are unfamiliar with the details of the law and those who receive inadequate legal assistance.

If we can be of any further assistance, please do not hesitate to contact us.

Sincerely,

Nicholas Di Marzio

Msgr. Nicholas DiMarzio
Executive Director

Senator **Kennedy**. Thank you.

We will hear from the entire panel first, because I think we are going to hear some different concerns, so we will hear from all the panel.

James Paras, Chairman of the Labor Relations Council, U.S. Chamber of Commerce.

U.S. CHAMBER OF COMMERCE STATEMENT

Mr. **Paras**. Thank you, Senator.

I appear, as you said, as the Chairman of the U.S. Chamber of Commerce's Labor Relations Council, but I have been involved with regard to this statute I guess in three capacities: One, in the position as Chairman of the Labor Relations Council of the Chamber, which has been actively working with the INS and will shortly submit on behalf of the business community detailed comments in response to the proposed regulations which the INS has issued.

I also happen to be on the Governing Council of the American Bar Association Labor and Employment Law Committee, and there with the union co-chairman have had the responsibility of establishing a program in which Senator Simpson and other people will participate in May, which will be by satellite, and sent to some 50 cities in the United States. So, the bar is also active in this educational program.

I have been a practitioner in this labor and employment law field for some 30 years, and I can tell you in all honesty that rarely have I seen a statute that is more complex than this. I think there is a general feeling out there that this is a legalization statute. It is far more than that, and you gentlemen know that, but I am not sure that the American public and the employer community fully understand the ramifications of the statute.

It is a legalization statute; it is an employment statute. In fact, in a way we do not really even have the statute today, and I think that is the genesis of a very serious problem. The statute, as you know, was signed into law in November of last year. We will not really have a statute until the regulations of the INS become final.

INS TO BE COMPLIMENTED

I think the INS frankly should be complimented for the work that they have done, for they have recognized the complexity. They have done something unique in my knowledge in handling legislation.

Normally, when a statute is passed by Congress, there may be enacting legislation by the agency that has responsibility for the oversight of that statute, and the normal procedure is to publish regulations pursuant to the Administrative Procedure Act and allow interested parties to comment and then to finalize those regulations and then we have really what is the body of law.

Here the INS took an unusual, and I suggest necessary, step which demonstrates the complexity of the problem that we deal with. They actually issued what I call pre-APA regulations to get comments from interested groups, from management, from labor, from agencies, from the public in general before they even propounded the proposed APA regulations. Now, the comments on the regulations will not even be due until April 20th in the case of one set of regulations, and April 22nd on the other.

We are not going to have a law with all of the requirements—indeed the requirements are going to be in the regulations, not in the basic statute— before June 1st of this year.

I am not going to repeat what has been set forth in the written statement, but I would like to make three major points, if I may. I would like this committee to consider, and I would like the INS to seriously consider deferring for 6 months the so-called period of sanction.

DELAY IMPLEMENTING LAW FOR 6 MONTHS

I think what we need in this country, what employers need, what individuals need, what organizations need is a period of understanding of what these regulations really require. This statute, which is essential now, will succeed only if there is voluntary compliance. To have voluntary compliance, you have to have understanding, you have to know what the regulations provide. To have understanding, you have got to have education.

I suggest to you that it is unfair, it is impossible, it is impractical to effectively pass a statute in November, to make it effective in January, with a whole series of regulations that people are learning about for the first time and start the enforcement mechanism at that point in time. So the first point is that it would be far better in the long run, we will all gain more if we have a six-month period of what I would call education and to defer the sanctions provisions until December 1st of this year.

VERIFICATION PROCEDURES

The second point is an area in which I know that INS has been tussling. I think they believe that there is a problem in the statute—I do not agree with that—and that is the question of which organizations can effectively monitor and administer the verification procedures with regard to employment.

I suggest that union hiring halls be utilized in the implementation of this statute. If you look through the legislative history, it was recognized that some of the major problems in the hiring and utilization of illegal aliens in this country occurred in industries in which union hiring halls are really the center of the hiring process. If you look at the maritime industry, if you look at the construction industry, if you look at the warehouse industry, if you look at trucking, the source of employment in those highly unionized industries are union hiring halls. The employers really have no control at all over the hiring of individuals. They are bound by collective bargaining agreements to hire those employees who are referred to them through the hiring halls. I am not here to criticize that, but merely to state what the facts of the workplace really are.

Indeed, in the maritime industry—I am from San Francisco—on the West Coast, and I believe the same is true on the East Coast, people are referred to the employer on a daily basis. You need 20 longshoremen, you call the hall and on Monday you get 20 longshoremen, on Tuesday you get 20 different longshoremen. To have the employer responsible for the verification process on a daily basis makes no sense.

The records with regard to these people are kept in the hiring halls. Indeed, in most of these industries, the employers merely pay the wages. Most of the fringe benefits are paid through joint trustee plans covering not only pensions, hospital, medical coverage, but vacation pay, and I would suggest to you that the statute as it currently stands is sufficient to require hiring halls to discharge this important obligation if the statute is going to be effective in these industries, which historically have been the source of a great deal of problems to which this statute is directed.

INS INSPECTIONS

My final point relates to what I will call INS visitation rights. As the regulations currently proposed by INS stand, they would have the right to enter an employer premises without any notice in advance and demand to see any and all records which an employer may be required to keep under this legislation. I think that is unfair. I think that is unreasonable and I suggest to you that it is even un-American.

No other governmental agency which has similar type of responsibility for monitoring compliance which have obligations such as the Department of Labor for checking employer records has that right of entry.

I suggest that the INS be granted no less than the Department of Labor and other agencies, but that they be granted no more. The manner in which these visitations are normally conducted is that the agency calls the employer and makes an appointment to check the records, and I would suggest to you in 99.9 percent of the cases that is all handled reasonably and amicably.

In the few cases where a problem may arise, then the INS should resort, as other agencies do, to subpoena power or to warrants properly obtained and not to surprise visits.

We now have a statute that makes very clear what obligations employers have with regard to the hiring of individuals. We do not need to resort to the procedures that the INS has used in the past, procedures which many courts have struck down at that time.

Senator KENNEDY. You have about 30 seconds left.

Mr. PARAS. I would conclude by saying that the business community I believe has cooperated and will continue to cooperate with the INS to establish sensible and workable rules for the administration of this statute.

The INS deserves high marks for the work that it has done to date and for its cooperation with the business community and with others. I ask you to recognize that, although it is terribly important that this job be done promptly, it is more important that it be done properly, and for that, I think the business community and the Nation needs more time.

Thank you.

[The prepared statement of Mr. Paras follows:]

Statement of the Chamber of Commerce of the United States

ON: P.L. 99-603, THE IMMIGRATION REFORM AND CONTROL ACT

TO: SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY OF THE SENATE COMMITTEE ON THE JUDICIARY

BY: JAMES C. PARAS

DATE: APRIL 10, 1987

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest federation of business companies and associations and is the principal spokesman for the American business community. It represents approximately 180,000 businesses and organizations, such as local/state chambers of commerce and trade/professional associations.

More than 91 percent of the Chamber's members are small business firms with fewer than 100 employees, 58 percent with fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—numbers more than 11,000 members. Yet no one group constitutes as much as 29 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 56 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

STATEMENT
on
P.L. 99-603, THE IMMIGRATION REFORM AND CONTROL ACT
before the
SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY
of the
SENATE COMMITTEE ON THE JUDICIARY
for the
U.S. CHAMBER OF COMMERCE
by
James C. Paras
April 10, 1987

Good morning. My name is James C. Paras. I am Senior Partner of the San Francisco law firm of Morrison & Foerster, and I serve as Chairman of the U.S. Chamber of Commerce's Labor Relations Council. I also am a member of the governing council of the Labor and Employment Law Section of the American Bar Association. Accompanying me today is Virginia B. Lamp, Labor Relations Attorney for the Chamber. Thank you for this opportunity to discuss the impact of the new immigration law on the business community. The Chamber hopes that this hearing signals the start of fair and meaningful oversight of the complexities of this law and a recognition of the emerging, serious concerns of employers and others.

Compliance by employers is absolutely critical to the success of this law. However, the efforts by employers will depend largely on 1) the simplicity of compliance, 2) the availability of information and answers to questions as they arise, and 3) the responsiveness of federal, state, and local agencies involved, directly or indirectly, with these new employment rules.

Contrary to popular belief, this law is not simply an immigration law. Rather, it is a major employment law with significant economic and social implications affecting all hiring practices of all employers, as well as citizens and "intending-citizens" who will be asked, for the first time, for new documents to prove their legal status to work in the U.S. As Congressman Mazzoli said upon the law's enactment, "for business, it means a new era."

We commend the Immigration and Naturalization Service (INS) for its openness and willingness to listen to our concerns and their efforts to address these concerns within the constraints of the statute and its budget. It is our view that many of the problems of this law result from the statutory language, not the implementation efforts, per se, of the INS. Nevertheless, there are some problems, which we will discuss.

As you may recall, the Chamber opposed the bill eventually enacted into law for two principal reasons: (1) the employer sanctions with its mandatory record-keeping and verification requirements and (2) the new anti-discrimination rules. Our concerns were about the legal and practical burdens these new rules would place on business. We now fear that our concerns may have been well-founded.

We have worked aggressively to educate our members and the business community at large about this new law. We realize, perhaps more than Congress or the federal government, the Herculean task involved in trying to educate the employer community on these complex, new hiring requirements.

To achieve this goal, we have done the following:

- printed and distributed 200,000 simple, easy-to-read brochures putting employers on notice of the new law (see Appendix 1);
- communicated regularly with INS staff, including a formal meeting between Commissioner Alan Nelson and Chamber President Richard L. Lesher;
- distributed a "Voice of Business" column to 668 newspapers in December, 1986 on the subject of the immigration law (see Appendix 2);
- issued a press release in December, 1986 to alert the media to this emerging issue within the business community (see Appendix 3);

- featured Commissioner Nelson on our popular Ask Washington call-in television program;
- printed articles on the new law in appropriate Chamber publications to ensure wide dissemination about the new requirements of the law (see Appendix 4); and
- submitted informal comments on the draft regulations circulated by INS in January, 1987 (see Appendix 5).

In addition, we currently are doing the following:

- preparing formal and extensive comments on the proposed regulations;
- responding to an ever-increasing number of telephone and written inquiries about the new requirements;
- preparing a comprehensive guide for small to medium-sized employers and personnel specialists on how to comply with the law; and
- working with a broad-based coalition of other business trade associations, companies, and law firms interested in monitoring and participating in the evolution of this legislation as it relates to employers.

INS realizes, as we do, that employers' willingness to comply voluntarily is critical to the success of this law. Complex and onerous procedures do not serve either the interests of the Chamber or the INS.

Despite our efforts and those of the INS and other organizations, we believe that the vast majority of employers in America have yet to realize that it is unlawful to:

- knowingly hire unlawful aliens;
- hire anyone after November 6, 1986, without examining certain documents;

- fail to fill out, sign, or retain for the proper amount of time a new federal verification form (which has yet to be finalized or widely distributed);
- continue to employ an alien known to have lost his or her legal status;
- contract out for labor if you know or should have known that the work force includes undocumented aliens; and
- discriminate against citizens or "intending-citizens."

Our membership sales representatives advise us that the common perception among most employers is that this law only applies to those who hire illegal aliens. Obviously, this is not the case, and to change such a widespread misconception will take a long and extensive educational effort.

We believe that the remaining 51 days are insufficient to educate the business community and the general public about the need to and how to comply with this new law. The U.S. Chamber of Commerce urges Congress to extend the public education period for an additional six months. Since we have the law, we want it to be successful — but time is needed to achieve this goal. Extending the public education period, prior to the enforcement of employer sanctions, will give employers and job applicants a more reasonable opportunity to become aware that failure to present proper documentation will result in denial of a job.

Let me describe how employers are responding, based on the feedback and inquiries the Chamber is receiving from its members.

Although it may be too early to determine the overall impact of this legislation, one thing is certain: the law has had and will have a far greater impact on the cost of doing business and hiring practices affecting both employers and newly hired individuals than Congress or proponents realized during its consideration. Even those businesses that, by their non-participation in the legislative process, evidenced a tacit approval for immigration reform in principle seem to be contacting their respective trade associations now to express serious concern over the practical burdens and complexities of designing an implementation scheme for this law. The effect of the immigration law will vary from industry to industry and company to company. Most of the inquiries that we have received come from employers with labor-intensive operations or high turnover rates.

The Chamber has heard serious and unresolved concerns raised in the following areas:

- When should an employer refuse to hire individuals unable or unwilling to present proper documentation? Now? Beginning June 1? Beginning upon receipt of the official I-9 form?

- Many U.S. citizens appear unable to meet the verification requirements. Should employers only be given three days when duplicating a Social Security card may take as long as 30 days? Should employees be denied employment opportunities due to slow federal or state bureaucracies?

- What should an employer do if he or she is looking at a suspicious document? Will INS be readily available to certify the document's authenticity? Even if that were true, in the meantime, should the employer hire or refuse to hire that individual? Would it be best for an employer to err on the side of acceptance or rejection of the suspicious document? Asking for documentation beyond what is offered voluntarily could expose the employer to liability from discrimination claims. Therefore, there are two substantial pitfalls for an employer while attempting compliance with this law. On the one hand, the employer faces liability for knowingly hiring an illegal alien. On the other hand, the employer faces discrimination liability if he or she is overly cautious. To what standard will the employer be held accountable for reviewing such documents? Do they, for instance, have to know that "green cards" are blue?

- To what extent is an employer going to be held accountable for those hired after November 6, 1986, but before the "public education" effort is under way or completed? Employers are confused about having to go back and verify these workers — who may or may not still be employed. Should they fill out a temporary, unofficial I-9 form? Would such good-faith compliance protect them from charges of discrimination? INS tells us that this employer will have to transfer the information on to the official I-9 form upon its availability. In most cases, this is unreasonable.

- When and how will INS distribute the relevant forms and educational material to employers and the general public?

Other practical problems and questions are evolving each day. Some of them are discussed in the "informal" comments the Chamber submitted to the draft regulations circulated in January (see Appendix 5). Other issues will be discussed in our formal comments to the regulations. Still other issues will surface as enforcement begins.

In summary, many employers, who bear the bulk of responsibility under the new immigration law, are confused, misinformed, or uninformed. The Chamber and others are attempting to educate employers and others about the law, however; much remains to be done. As far as INS is concerned, the Chamber has been disappointed with the educational effort to make implementation smooth and successful.

The Chamber recommends that Congress extend the "public education period" for another six months prior to beginning enforcement.

In addition, we encourage the Congress and this subcommittee to be sensitive to the requests and burdens being placed on employers and to consider:

- continued meaningful oversight--highlighting the concerns of the business community and
- special congressional field briefings in concert with INS, local chambers of commerce, and others for the media, citizens, employers, and all affected special interest groups to help facilitate greater public awareness of this law over the next six months.

Thank you again for this opportunity. I look forward to answering your questions.

The attached draft form may be helpful for checking documentation on all new hires until INS distributes their final forms.

Temporary Supplement to Employment Application

APPLICANT ATTESTATION

I declare and affirm under penalty of perjury that I am (check the appropriate box):

☐ A citizen or national of the U.S.
☐ An alien lawfully admitted for U.S. permanent residence
☐ An alien authorized under the U.S. Immigration and Nationality Act to be hired in the position for which I have applied

____
Applicant's Signature

I understand that the U.S. government requires the company to verify my *eligibility* for U.S. employment and my *identity*. I understand that the company must decline to hire me if I fail to present adequate proof of my eligibility and identity.

As evidence of eligibility and identity, the government requires applicants to submit *originals* of one document from Group "A" or one document for *both* Group "B" and Group "C".
Please check the evidence you will submit.

GROUP A
☐ U.S. Passport
☐ Certificate of U.S. citizenship
☐ Certificate of Naturalization
☐ Unexpired foreign passport with unexpired work authorization endorsement of the Attorney General
☐ I-551 alien registration receipt card with photograph

GROUP B
☐ Social Security Card (Absent no-work endorsement)
☐ U.S. Birth Certificate or certificate establishing U.S. nationality at birth
☐ Other document approved by Attorney General authorizing employment by the applicant in the U.S.

GROUP C
☐ State Driver's License with photograph
☐ Other form of state I.D. with photograph
☐ Photo I.D. approved by Attorney General

EMPLOYER ATTESTATION

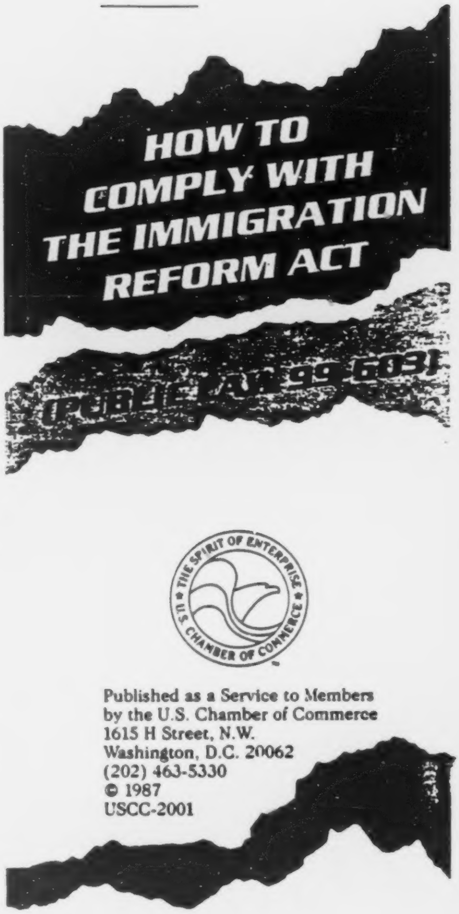
On behalf of the XYZ Corporation, I declare and affirm under penalty of perjury that I have verified the U.S. work eligibility and identity of __________________________ based upon an examination of the above indicated documentary proof which appears to be genuine on its face.

XYZ Corporation

____
By: John Doe, Personnel Manager

This affidavit should be retained in the employment verification file for a period of three years following the applicant's date of hire, or one year after the date of termination, whichever is later. Photocopies of supporting documents should be attached.

APPENDIX 1



HOW TO COMPLY WITH THE IMMIGRATION REFORM ACT

(PUBLIC LAW 99-603)

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The Immigration Reform Act (Public Law 99-603), signed by the President on November 6, 1986, affects all employers and all hiring — not just the employment of aliens.

After an information period expiring on May 31, 1987, every newly-hired employee must exhibit to the employer documents that establish both his identity and his authority (i.e. eligibility) to be employed. (Note: All workers employed prior to November 6, 1986, are "grandfathered" by the law. In other words, although currently employed undocumented workers can be deported, an employer will not be penalized for illegal aliens hired prior to November 6, 1986).

- Identity can be established by a driver's license with a picture or by some other document to be found by the Attorney General sufficient for the purpose.
- Authorization to be employed can be established by a social security card, a U.S. birth certificate, or other evidence to be found by the Attorney General sufficient for this purpose.
- BOTH employment identity and authority can be established by a U.S. passport, a certificate of U.S. Citizenship or of naturalization, a foreign passport endorsed with authority to be employed, or an alien card bearing a picture and employment authorization ("green card").

In addition, the employee must attest to his status and the employer must attest to his examination of documents, both on a form that is to be prepared by the Attorney General (or in the interim, on the form attached).

There are many questions that must await the forms and regulations to be published by the Attorney General. In the meantime: Employers (and employment agencies) should realize that they will have to establish new hiring procedures; and employment applicants should be arranging for the availability of the required documentation.

OTHER IMPORTANT CHANGES:

1. From June 1, 1987, until June 1, 1988, each employer will be entitled to one offense without penalty.
2. The Act also provides for legalization (amnesty) of aliens illegally in the U.S. since before January 1, 1982.
3. Discrimination in hiring or firing by employers of four or more persons, based on national origin or citizenship status, is forbidden against anyone other than unauthorized aliens.

The latter requirement concerning anti-discrimination is the best reason to begin asking for proper identification from all individuals hired after November 6, 1986. Do not selectively ask for documentation based on appearance, or accents.

This publication is designed to provide accurate and authoritative information regarding the subject matter covered. It is distributed with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

APPENDIX 2

The Voice of Busines

Richard L. Lesher, President
Chamber of Commerce of the United States

DAMNED IF YOU HIRE, AND DAMNED IF YOU FIRE

WASHINGTON -- The new immigration reform law promises to make more mischief for business than the Occupational Safety and Health Act ever did.

To be sure, our immigration laws were in dire need of reform, and the U.S. Chamber of Commerce supported a bill adopted by the Senate this year. Unfortunately, the measure that emerged from a Senate-House conference committee is poorly conceived and will surely cause more problems that it solves.

Contrary to what you may have heard, under the new law every employer must verify the status of every new employee by demanding certain documents regarding the worker's legal status. The paperwork and recordkeeping burden will be costly, especially for small employers, but failure to comply will be even more costly. The Immigration and Naturalization Service is authorized to fine employers up to $1,000 for each paperwork violation -- regardless of whether the employer has hired any illegal aliens.

It is difficult to imagine how this law could have any detectable impact on illegal immigration. Any job applicant who can produ a Social Security card or birth certificate, along with a driver's license bearing a photo, can meet the law's requirements. It is no great secret that such things are easy to come by, even for illegal residents. In any event, we can assume a flood of phony documentati will render this program virtually meaningless.

12/8/86

CHAMBER OF COMMERCE OF THE UNITED STATES / 1615 H STREET, N.W. / WASHINGTON, D.C.

And there is an aspect of this law even more troubling than the paperwork hassle. It creates a new category of civil rights and sets up a new office within the Justice Department to enforce it. Existing civil rights legislation already outlaws discrimination based on national origin, but it exempts small employers with fewer than 15 employees. Under this new law, those who employ between four and 14 employees will be subject -- for the first time -- to charges of discrimination on the basis of national origin only.

In other words, any employer who fears a job applicant may be an illegal alien and who declines to hire on that basis, or who dismisses an employee suspected of illegal status, runs the risk of being sued for discrimination. The bottom line will be an explosion of new litigation. Employers will be damned if they hire and damned if they fire.

Employers have until June 1, 1987, to beome familiar with the law's paperwork and hiring sanctions (through the civil rights provision is already in effect). After that, there will ensue a flood of fines and lawsuits as business struggles to cope with this new federal program and its ambiguous requirements. I predict a storm of protest commensurate with that which greeted the first arrival of OSHA inspectors in the early 1970s.

# # #

U.S. Chamber of Commerce
1615 H St., NW
Washington, DC 20062

News Department (202) 463-5682

APPENDIX 3

NEWS

FOR IMMEDIATE RELEASE

Contact: Frank Benson

NEW IMMIGRATION REFORM LAW PROVING CONFUSING, BAFFLING TO BUSINESS, CHAMBER MEMBERS REPORT

WASHINGTON, Dec. 2 -- Substantial concern and confusion exists within the business community about how to comply with the recently-enacted Immigration Reform and Control Act, the U.S. Chamber of Commerce reported today, as business executives try to familiarize themselves about what could be a new legal morass and paperwork nightmare.

"The new immigration law already has prompted scores of questions from Chamber members," said Virginia B. Lamp, Chamber labor relations attorney, "and the answers we are able to provide invariably generate additional queries." During the current six-month "education" period provided in the law which began December 1, the Chamber along with appropriate federal agencies hopes to provide necessary guidelines and explanations of the new law's intricacies for business executives, Lamp added.

The Chamber especially will seek to reach the nation's small employers, who comprise 90 percent of the business federation's membership and who are, for the first time, subject to claims of discrimination based on alienage or national origin under the law enacted during the waning days of the 99th Congress.

Technically, it became unlawful to hire an undocumented worker after November 6 -- the date the president signed the bill into law. However, no one will be cited for a violation until June 1, 1987. Even at that time, all employees hired prior to November 6 are exempt from scrutiny and cannot be the subject of fines or punishment.

Chamber staff together with outside legal scholars are preparing a guidebook in lay language to explain the provisions of the new immigration law, and to simplify just what the law calls for on behalf of employers and their workers. The Chamber also is exploring with the Immigration and Naturalization Service (INS) how best to educate and implemen new requirements under the law through a variety of mediums, publications and other educational methods.

(over)

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All employers must revise their hiring processes in accordance with the new law, Lamp said. Forms will be available from the INS, but employers should be advised that they must be extremely careful since penalities exist for both hiring and firing under the new immigration law, the Chamber labor attorney added. The INS will be issuing clarifying regulations next spring as well as the necessary forms for checking all new hires.

The Chamber is encouraging its members to share with its Washington office business members' experiences with new requirements under the law, especially paperwork and compliance provisions. Through contacts with the Chamber's state and local chamber members as well as trade and professional association members, information about what businesses are encountering in attempting to meet these procedures plus the time and expense of complying with record-keeping sections will help the Chamber convey such experiences to officials in both the executive and legislative branches of the federal government.

While the Chamber supported reform of the nation's archaic immigration laws, the business group took issue with the final version of the Immigration Reform and Control Act and urged its rejection because of three provisions:

1. The creation of a new basis for claims of discrimination against employers by aliens, which could subject employers of more than three employees to countless law suits;

2. The expansion of coverage for claims of discrimination based on national origin to employers with more than three workers (previously 15 or more workers); and

3. The imposition of fines of up to $1,000 for each flaw in an employer's recordkeeping, whether or not an employer actually hired an illegal alien.

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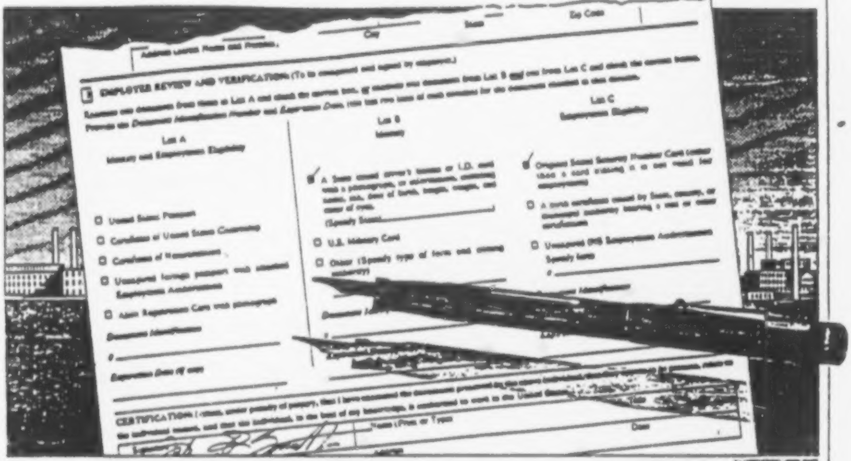
APPENDIX 4

Nation's Business April 1987

Coming Soon: Crackdown On Hiring Illegal Aliens

By Roger Thompson

All employers must determine that every person hired since Nov. 6, 1986, is eligible to work in the United States. The verification process will require employers to fill out and sign the bottom half of an INS form similar to the one below. Employees will fill out the top part.



Sen. Alan K. Simpson spent five years fighting to enact a law banning illegal aliens from the workplace, culminating in a tough new immigration bill signed by President Reagan last November. Five months later, the Wyoming Republican says the employers of America still don't understand what is about to hit them: "They're asleep at the wheel."

But employers are in for a rude awakening—and soon. Enforcement of the Immigration Reform and Control Act of 1986 begins June 1, although at first violators will receive only warnings.

"This law is the most massive imposition of government regulation on employers and employees in decades, maybe ever," says Lucas Guttentag, director of the Immigration and Aliens' Rights Task Force of the American Civil Liberties Union.

It already is causing massive confusion. Fearing sanctions, employers in the Washington area reportedly have fired hundreds of Hispanics, primarily Salvadorans, from hotel, restaurant and construction jobs. The law, however, does not penalize employers for retaining illegal aliens hired before Nov. 6, 1986, the day Reagan signed it. Only those hired after that date will be required to meet the new documentation standards, which apply to American citizens as well as aliens.

For employers, the documentation requirements will trigger a paper work avalanche costing an estimated $675 million a year to manage, says Charles Cadwell, deputy chief counsel for advocacy of the Small Business Administration.

Alternatively, employers may balk at the law's paper work requirements and simply ignore them. "It's going to be like prohibition," predicts an administration official who asked not to be identified.

Perhaps. But Sen. Simpson isn't convinced that the law is anywhere near as onerous for employers as critics allege. Says he: "The burdens on the employer, in my mind, are minimal."

Employers will begin to weigh in with their own opinions later this month when the Immigration and Naturalization Service publishes final regulations to enforce the law.

The law essentially does four things:

- Makes it a federal crime to hire illegal aliens;
- Creates an amnesty program to grant legal status to aliens in the country since Jan. 1, 1982;
- Provides legal status to foreign farm workers who worked in the fields at least 90 days between May, 1985, and May, 1986;

"This law is the most massive imposition of government regulation on employers and employees in decades, maybe ever."

For the first time, American citizens as well as aliens must show employers proper identification and work authorization documents to be hired.

- Imposes new penalties on employers who discriminate against workers on the basis of national origin or citizenship.

The crackdown on hiring illegal aliens actually will affect only a small minority of the nation's 4.4 million employers, says Simpson. "My hunch is that the great majority of employers do not hire illegal, undocumented persons, and they have been very careful over the years not to do so."

The fact remains that upwards of 4 million illegal aliens have found work in the United States. Getting them off the payrolls was the motivating force behind passage of the new law.

Implementing the law will change hiring procedures of every employer. Henceforth, every employee must provide documented proof of identity and eligibility to work and fill out a form, designated as I-9 by INS, attesting, under penalty of perjury, that the information provided is truthful.

Some documents establish both identity and work eligibility: a U.S. passport, a certificate of U.S. citizenship or naturalization and an unexpired foreign passport carrying the appropriate INS work permit stamp.

As an alternative, a job applicant must submit one document establishing identity and another establishing work authorization. The most common identification document is a driver's license with a photo. Applicants may also use an original identity document issued by any state, a notice of discharge from the U.S. military or a document showing active duty in the military. The work authorization document may be a Social Security card or birth certificate from any state or a State Department document confirming birth abroad of a U.S. citizen.

Employers must list the documents inspected and sign the I-9 form (see illustration), indicating that the documents "appear to be genuine." "If you [an employer] believe it's a valid document, then you have met your requirements under the law," says Mark W. Everson, INS executive associate commissioner (see page 34). Drafted INS regulations recommended that employers make photocopies of the documents "for the purpose of showing good faith compliance with the verification process."

Jeff Prince, a senior director of the National Restaurant Association, calls this "defensive bookkeeping." Although photocopying is optional, "an employer will have to assume the cost and expend the time to make photocopies to prove he is innocent," says Prince.

The law provides stiff penalties for those who fail to comply. Employers who hire illegal workers can be fined between $250 and $10,000 for each alien and sent to jail for up to six months, depending upon the number of prior violations. There are no exceptions. This provision covers all employers—from General Motors to suburban yuppies with full-time baby-sitters.

To guard against wholesale discrimination against aliens who are eligible to work, the law provides antidiscrimination penalties that apply to all employers with at least four employees. Fines range up to $2,000 for each individual discriminated against.

Gideon Epstein, a Justice Department forensic documents analyst, checks foreign passports for forgery, which may increase under the new law.

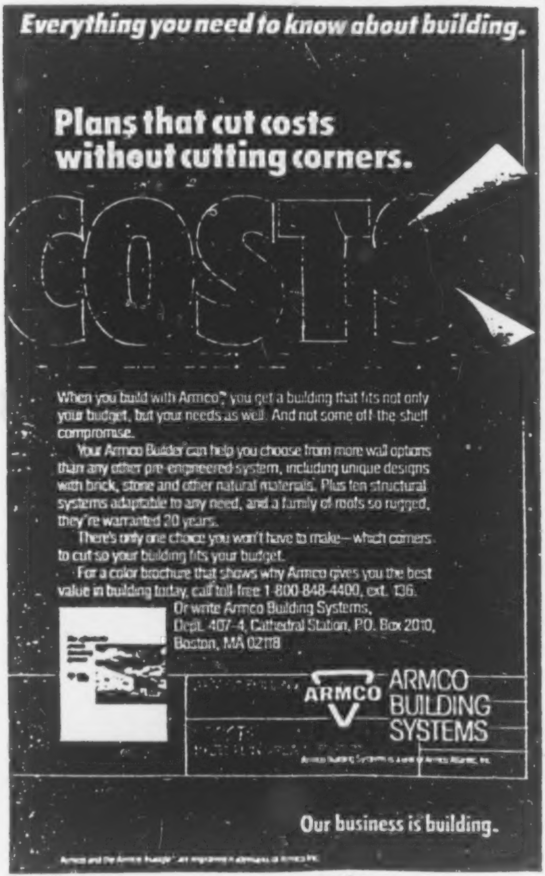
Employers who don't hire illegal aliens and don't discriminate still can get slapped with a fine up to $1,000 for each instance in which they fail to file and retain the I-9 form for each new employee. Employers must retain these records for three years, and, in any event, may not dispose of them until at least one year after an employee leaves.

Critics of employer sanctions "are overlooking the responsibility of the employee here," says Simpson. "For the first time a job applicant can be fined or jailed for providing fake documents."

INS plans to target enforcement activities on businesses that have a history of hiring illegal aliens. The agency will add 932 new investigators by the end of fiscal year 1988 to enforce the employer sanctions provisions.

The law gives the agency unprecedented authority to demand immediate inspection of employers' records. Proposed regulations state that INS or Labor Department officials could "walk into any place of business, flash a badge and start looking through files," says Muzaffar Chishti, head of the immigration project at the International Ladies' Garment Workers Union.

The union spearheaded a coalition of 28 Hispanic, labor, religious and civil liberties groups in objecting to proposed regulations, including inspection of employers' records without search warrants, subpoenas or advance notice.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While the law technically took effect November 6, it provided a six-month public education period during which no enforcement activities take place. INS plans to send every employer a package with detailed information on how to comply. For one year, beginning June 1, employers will receive only a warning for a first offense. Thereafter, the law will be in full force.

INS soon will open about 100 offices around the country to take applications from aliens who want to apply for legalization under the law. They may do so during a one-year period beginning May 5.

The agency expects about 4 million applications, representing a majority of the approximately 7 million illegal aliens it estimates are currently living in the United States.

Immigration lawyers maintain that adequate documentation may be a problem for many applicants, whether American citizens or aliens. "Most people don't carry around a passport, a birth certificate or even a Social Security card," says Mary E. Pivec, a labor and immigration specialist with the Baltimore firm of Frank, Bernstein, Conaway & Goldman. In fact, Sen. Simpson acknowledged that he recently had to write for a replacement for his own Social Security card.

INS has proposed giving workers 24 hours after being hired to produce the necessary documents. Even so, Pivec says many employers who hire large numbers of unskilled workers may not be able to fill vacancies in a timely fashion because applicants cannot immediately produce the required documents.

"The response I'm getting from employers is they don't know how they are going to get the documentation to put people on the payroll," says Pivec.

Such delays will discourage compliance. "The problem will be with small or medium-sized employers who see this as an extra administrative cost and have to weigh the cost against the practical requirements of doing business," says Pivec. "A lot may decide not to comply."

Sen. Simpson maintains that widespread, voluntary compliance will work: "The employer doesn't have to do anything at all, just keep a record of documents. Now what's so oppressive about that?" ■

To order reprints of this article, see page 57.

How Will The New Law Affect You?

Mark W. Everson, Immigration and Naturalization Service executive associate commissioner, responded to our questions about implementation of the Immigration Reform and Control Act of 1986.

Are there any employers who are not affected by the new law?

The law makes no exceptions. All employers have to comply with the legislation. Anytime someone changes jobs after the date of enactment—Nov. 6, 1986—the employer is required to develop the right documentation indicating that he or she has taken certain steps to verify the individual's eligibility to work.

How does an employer do that?

He has to examine a document that shows identity and establishes that the individual is authorized to work. A passport does both. Or he can examine a combination of documentation showing identity and authorization to work.

A document establishing identity would commonly be a driver's license with a picture. That document in combination with, say, a Social Security card, would indicate eligibility to work.

Do illegal aliens have a right to either a U.S. driver's license or social security card?

Standards for issuance of a driver's license vary by state. But many illegal aliens do have Social Security cards that they have obtained fraudulently.

Do employers have to verify driver's licenses and Social Security cards?

The standard of the statute is that the document must "reasonably appear on its face to be genuine." So it's a judgment call on the part of the employer.

Are employers required to report to INS any alien who does not qualify for work or who submits fraudulent documents?

There is no obligation on the part of the employer to do other than examine the documentation and to employ only those individuals who the employer believes meet the qualifications.

What happens to illegal aliens who were employed Nov. 6, 1986, but who won't qualify for legalization?

When they want to change jobs, they probably will have difficulty securing employment because the employer will quickly determine that the individual is not authorized to work. We expect that these people, over time, may very well return to their countries of origin.

Mark W. Everson, INS executive associate commissioner, says enforcement of the new immigration law rests primarily with employers.

Employers have no obligation to fire those people who will not qualify for legalization and who were on the payroll before November 6?

Correct. The employers are not subject to penalties, but the employees are still in violation of the law. For instance, if we come into a company and determine it has a large number of illegal aliens and they had all been hired before November 6, there would be no legal ramifications for the employer. But we might initiate proceedings against the employees themselves.

Will aliens who apply for the legalization program be able to work while they wait months for the outcome?

Right now, employers should understand that there will be no inspection of documentation prior to June 1, when sanctions begin. An employer would want to encourage those coming into his employ now who indicate that they qualify for the legalization program to make early application when the application period starts May 5.

Once someone has entered the legalization process and there has been an initial determination of eligibility, the INS is going to issue documents that will authorize the alien to work, pending final review of his file.

Will this new law be time-consuming or confusing for employers?

We believe the process will be relatively simple. We are trying to make it as clean and as easy as possible. But I'm sure that initially it will take some adjusting, as is the case with any new law.

Are you asking employers to be policemen?

Compliance, as with any law, is going to be largely voluntary in nature. We are strongly encouraging employers to follow the law of the land, which for the first time has specifically stated that they should not be employing those who are unauthorized to work. But it is very much a self-policing mechanism.

How do you establish a priority for investigating compliance?

You target those employers who have histories of employing unauthorized workers. There are pockets of industries throughout the country that have such histories. Restaurants and light industry are frequently mentioned, and, in some areas, construction.

Is the law enforceable?

Yes. First of all, we think it is important that a national policy has been stated to employ only those who have been legally authorized to work. It's the first time that statement has been made. We think most employers will comply.

Will INS officers be making unannounced inspections of employer records?

The statute clearly provides that documentation be "available for inspection." We will develop a reasonable standard as to how quickly documents need be produced.

Who will enforce the antidiscrimination provisions of the law?

The Justice Department is in the process of establishing an Office of the Special Counsel for Immigration-Related Unfair Employment Practices to review claims of discriminatory conduct.

Will employers walk a thin line between not hiring illegals and not discriminating?

I don't think so, because the documentation standards are quite explicit. All new employees, no matter how they look or where they are from, must have proper documentation. The same steps apply to everyone, so there is no reason for discrimination.

Labor Law

Immigration Reform Tough on Business

by Virginia Lamp

"Immigration reform was on its way to the morgue when its toe started wiggling," explains a representative from California.

In the final days of the 99th Congress, immigration reform was restored to life. A massive immigration reform bill passed the House by a vote of 238-173 and the Senate by a vote of 63-24. The bill will impose new responsibilities on the business community and grant amnesty to millions of undocumented workers who have lived in the United States since January 1982. Rep. Romano Mazzoli, D-Ky., the chief architect of the House legislation, proclaimed, "for business, it means a new era."

The Law and Business

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PASSPORT

The U.S. Chamber favored the Senate-passed immigration reform bill, but strongly opposed the final compromise version that emerged from the House and Senate conference committees.

Chamber opposition to the bill is centered on three provisions. The bill:

- Creates a new basis for claims of discrimination against employers by aliens, which would subject employers to countless lawsuits.
- Expands coverage of the current basis for claims of discrimination based on national origin to employers of more than three workers, rather than the current law which covers employers of 15 or more.
- Imposes fines of up to $1,000 for each flaw in an employer's record keeping — *even if the employer has not hired an illegal alien.*

Al Bourland, vice president of congressional relations at the U.S. Chamber says, "The proposed solution to the problem of illegal aliens has been devised at the overwhelming expense of the business community."

When the bill becomes effective, all employers must begin monitoring each new employee's eligibility. No new records, however, need to be kept on current workers.

The Immigration and Naturalization Service is authorized to fine an employer up to $1,000 for each instance where records are kept incorrectly or not kept at all — regardless of whether the employer has hired any illegal aliens.

An employer found hiring an illegal alien would be fined between $250 and $2,000 per alien for the first offense. The second offense would bring a fine of between $2,000 and $5,000 per alien, and the third offense between $3,000 and $10,000 per alien. For "pattern and practice" violations, employers could face a $3,000 fine and six months in jail per alien.

Fines will not be assessed until 18 months after the enactment of the legislation. The first 6 months will entail an "educational period." The federal government will be doing a massive educational campaign, which will include distributing copies of the new federal forms, to help simplify required procedures. Employers found hiring undocumented workers during the following 12 months will be given "citations."

Should an employer be shown fraudulent documentation by a prospective employee and later charged with knowingly hiring an illegal alien, the employer would have an affirmative defense, provided proper records have been kept and the false documentation appears reasonably genuine.

Behind Closed Doors

Labor unions have a big stake in immigration reform. Union bosses claim that illegal aliens depress wages for the rest of the work force. Originally, both unions and business were to share responsibility for checking employment eligibility. But organized labor lobbyists made sure unions would be exempt from responsibility even as they fought for stiff employer sanctions.

The bargaining session between House and Senate conferees on the immigration reform bill took place behind closed doors. When the doors were opened, various interest groups monitoring the legislation scrambled for information so they could determine whether to support or oppose the final product. With most of the attention focused on the major elements of the legislation—sanctions, amnesty, the guest-worker provisions and reimbursement for state and local governments—hardly anyone noticed that unions had been quietly exempted from any responsibility. Union hiring halls, when referring a worker, will have no responsibility for checking employment eligibility.

But while union officials from Washington, D.C., headquarters were lobbying for immigration reform on Capitol Hill, local recruiters throughout the United States were busy as well. Where were they? Out recruiting new members among illegal workers in fields and factories. According to the October 15, 1986, *Wall Street Journal*, the UAW, the ILGWU, the Teamster's Union, the Amalgamated Clothing and Textile Workers Union, and the Hotel Employees and Restaurant Employees International Union, to name a few, are finding ripe pickings among undocumented workers in Houston, Chicago, Los Angeles, New York and San Francisco.

Union organizers readily admit they have no choice but to recruit illegals if they are going to rebuild their strength. Organized labor is making a feast of what has been officially declared poison for business. Ironically, business will most likely bear the blame *if* and when immigration reform fails to stop the flood of illegal aliens.

New Civil Rights Procedures

Aliens who intend to be citizens under the legalization program will be given new and broad civil rights. Until now, employers with fewer than 15 employees have been exempt from civil rights laws that prohibit discrimination on the basis of national origin — as well as race, gender and religion. Now, for the first time, employers with 4 to 14 employees would be subject to discrimination charges on the basis of *national origin only.*

Before You Hire . . .

Examine a Social Security card or birth certificate, and a driver's license with a photo or other identifying information.

or

A passport, certificate of citizenship, an unexpired foreign passport, resident alien card or other alien registration card with a photo or other identifying information.

A special counsel will be created within the Justice Department, with regional offices throughout the United States, to enforce new civil rights created under the bill. Discrimination charges will be processed through this new agency instead of through the Equal Employment Opportunity Commission, which administers all other civil rights protections.

The special counsel's office will investigate discrimination claims that are now considered likely to occur. Employers' fears of civil and criminal penalties for hiring undocumented workers may make them reluctant to employ *any* aliens.

The bottom line will be a massive explosion of new litigation. Employers will be in trouble if they fire and in trouble if they hire. ■

For a detailed analysis of the immigration reform legislation, write to Virginia Lamp, Labor Relations Attorney, U.S. Chamber of Commerce, 1615 H Street, NW, Washington, D.C. 20062 or call (202) 463-5517.

Labor Law

All Employers Must Learn Rules for Hiring Under Immigration Reform

by Virginia Lamp

PASSPORT
Birth

The new Immigration Reform law promises to make more mischief for business than the Occupational Safety and Health Act ever did.

The law, signed by the president on Nov. 6, affects all employers — not just the employers of aliens. After May 31, every employer must inspect legal documents to verify the status of every new employee hired after Nov. 6. Likewise, every newly hired employee must show valid documents establishing his identity and employment eligibility.

Most important, employers need to be aware of the rules that will govern hiring procedures under the new immigration law:

- Identity can be established by a driver's license with a photograph.
- Employment eligibility can be established by a Social Security card or a U.S. birth certificate.
- Both employment eligibility and identity can be established by a U.S. passport, a certificate of U.S. citizenship or of naturalization, a foreign passport endorsed with authority to be employed or a green card — an alien card with a picture and employment authorization.

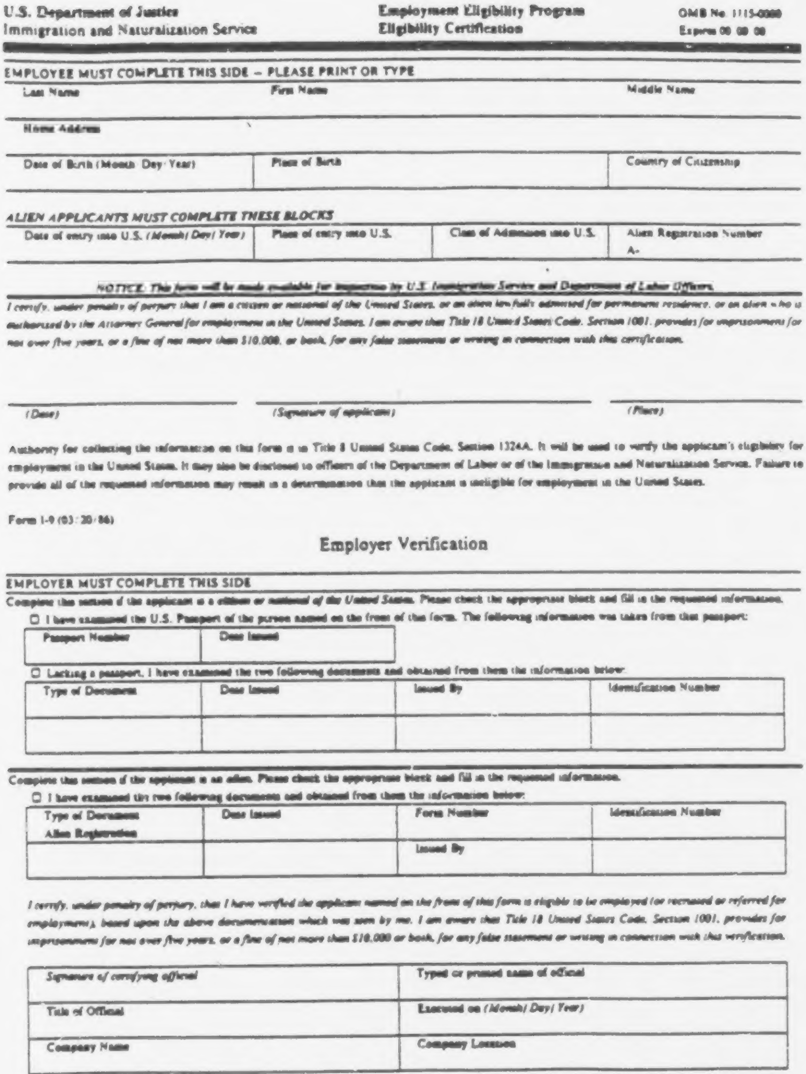
Whether or not any other evidence will be allowed to establish identity and eligibility will depend upon final regulations, to be issued by the attorney general next month.

- Each employee must affirm his status by signing a form prepared by the attorney general. Employers must attest to having examined appropriate documents on the same form. Until final regulations are issued, the form pictured on the facing page may be used.
- Aliens who illegally entered and have stayed in the United States since before Jan. 1, 1982, will be granted amnesty — if they meet the yet-to-be-stated requirements for establishing proof.
- Although undocumented workers can be deported, an employer will not be penalized for retaining illegal aliens hired before Nov. 6.
- Until June 1, 1988, each employer will be entitled to one offense without penalty.
- Discrimination based on national origin or citizenship status in hiring or firing against anyone other than unauthorized aliens is forbidden.

While existing civil rights law exempts employers with fewer than 15 employees from discrimination charges, under the new law employers with four or more employees will be subject to discrimination charges *based on national origin*. Because of the anti-discrimination requirement, employers should ask for proper identification from *all* newly hired individuals. *Do not selectively ask for documentation based on a potential employee's appearance or accent.*

Many questions regarding the new law will be answered when new forms and regulations are published by the attorney general in February. In the meantime, employers and employment agencies should realize that they must establish new hiring procedures and job applicants should prepare to show documentation. ■

For information on specific cases, consult your attorney. For further information on the Immigration Reform law, contact Virginia Lamp of the U.S. Chamber, 1615 H Street N.W., Washington, DC 20062 or call (202) 463-5517.



U.S. Department of Justice Immigration and Naturalization Service	**Employment Eligibility Program** **Eligibility Certification**	OMB No. 1115-0000 Expires 00 00 00

EMPLOYEE MUST COMPLETE THIS SIDE – PLEASE PRINT OR TYPE

Last Name	First Name	Middle Name
Home Address		
Date of Birth (Month Day Year)	Place of Birth	Country of Citizenship

ALIEN APPLICANTS MUST COMPLETE THESE BLOCKS

Date of entry into U.S. *(Month/ Day/ Year)*	Place of entry into U.S.	Class of Admission into U.S.	Alien Registration Number A-

NOTICE: This form will be made available for inspection by U.S. Immigration Service and Department of Labor Officers.

I certify, under penalty of perjury that I am a citizen or national of the United States, or an alien lawfully admitted for permanent residence, or an alien who is authorized by the Attorney General for employment in the United States. I am aware that Title 18 United States Code, Section 1001, provides for imprisonment for not over five years, or a fine of not more than $10,000, or both, for any false statement or writing in connection with this certification.

(Date) *(Signature of applicant)* *(Place)*

Authority for collecting the information on this form is in Title 8 United States Code, Section 1324A. It will be used to verify the applicant's eligibility for employment in the United States. It may also be disclosed to officers of the Department of Labor or of the Immigration and Naturalization Service. Failure to provide all of the requested information may result in a determination that the applicant is ineligible for employment in the United States.

Form I-9 (03/20/86)

Employer Verification

EMPLOYER MUST COMPLETE THIS SIDE

Complete this section if the applicant is a *citizen or national of the United States*. Please check the appropriate block and fill in the requested information.

☐ I have examined the U.S. Passport of the person named on the front of this form. The following information was taken from that passport:

Passport Number	Date Issued

☐ Lacking a passport, I have examined the two following documents and obtained from them the information below:

Type of Document	Date Issued	Issued By	Identification Number

Complete this section if the applicant is an alien. Please check the appropriate block and fill in the requested information.

☐ I have examined the two following documents and obtained from them the information below:

Type of Document Alien Registration	Date Issued	Form Number	Identification Number
		Issued By	

I certify, under penalty of perjury, that I have verified the applicant named on the front of this form is eligible to be employed (or recruited or referred for employment), based upon the above documentation which was seen by me. I am aware that Title 18 United States Code, Section 1001, provides for imprisonment for not over five years, or a fine of not more than $10,000 or both, for any false statement or writing in connection with this verification.

Signature of certifying official	Typed or printed name of official
Title of Official	Executed on *(Month/ Day/ Year)*
Company Name	Company Location

Temporary forms for employees to establish identity and work eligibility, and for employers to attest to having checked documents.

APPENDIX 4 (cont)

U.S. Chamber of Commerce
The Business Advocate [redacted]
JANUARY 1987

Hiring Policies Must Change

By Virginia Lamp

Employers have fewer than five months to adopt hiring procedures that meet requirements of newly overhauled U.S. immigration law. Failure to act could result in fines for paperwork violations as well as for knowingly hiring illegal aliens.

Immigration reform legislation enacted last November is intended to slow unauthorized immigration into the United States. However, because paperwork burdens and fines will be imposed on employers who have never hired illegal aliens, the U.S. Chamber of Commerce vehemently opposed the proposal.

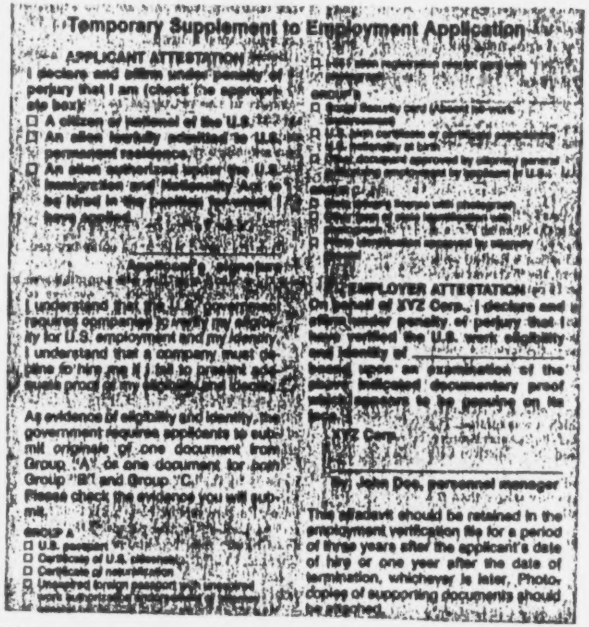
Under the statute, employees hired after last Nov. 6 must attest to their legal status and show employers documents establishing their identity and eligibility for employment.

Failure by employers to obtain required documentation and attest that they have done so could result in fines of up to $1,000 per employee — even if no illegal aliens were hired. Employers will be entitled to one offense without penalty during the one-year period ending June 1, 1988.

Employee identity can be established with a driver's license with picture or other documentation approved by the U.S. attorney general. Employment eligibility can be established with a Social Security card, U.S. birth certificate or other evidence approved by the attorney general. Both identity and eligibility can be established with a U.S. passport, certificate of U.S. citizenship or naturalization, foreign passport stating authority to be employed or alien card with picture and employment authorization.

Until the attorney general's office publishes official forms and regulations, use and save the form at right to properly is from a pamphlet, "How to Comply with the Immigration Reform Act," published by the U.S. Chamber. Copies are available by writing Membership Department, U.S. Chamber of Commerce, 1615 H St., N.W., Washington, D.C. 20062 or calling (202) 463-5330.

For more information, call Lamp at (202) 463-5517.



Temporary Supplement to Employment Application

APPLICANT ATTESTATION

I declare and affirm under penalty of perjury that I am (check the appropriate box):

☐ A citizen or national of the U.S.
☐ An alien lawfully admitted to U.S. for permanent residence.
☐ An alien authorized under the U.S. Immigration and Nationality Act to be hired in the position for which I have applied.

Applicant's signature

I understand that the U.S. government requires companies to verify my eligibility for U.S. employment and my identity. I understand that a company must decline to hire me if I fail to present adequate proof of my eligibility and identity.

As evidence of eligibility and identity, the government requires applicants to submit originals of one document from Group "A" or one document for both Group "B" and Group "C." Please check the evidence you will submit.

GROUP A
☐ U.S. passport
☐ Certificate of U.S. citizenship
☐ Certificate of naturalization
☐ Unexpired foreign passport with unexpired work authorization [illegible]
☐ [illegible] alien registration receipt card with photograph

GROUP B
☐ Social Security card (Absent no-work endorsement)
☐ U.S. birth certificate or certificate establishing U.S. nationality at birth
☐ Other document approved by attorney general [illegible]

GROUP C
☐ State driver's license with photograph
☐ Other [illegible] with photograph
☐ Other identification approved by attorney general

EMPLOYER ATTESTATION

On behalf of XYZ Corp., I declare and affirm under penalty of perjury that I have verified the U.S. work eligibility and identity of ______ based upon an examination of the above indicated documentary proof which appears to be genuine on its face.

XYZ Corp.

By: John Doe, personnel manager

This affidavit should be retained in the employment verification file for a period of three years after the applicant's date of hire or one year after the date of termination, whichever is later. Photocopies of supporting documents should be attached.

U.S. Chamber of Commerce
The Business Advocate
FEBRUARY 1987

Paperwork Avalanche Triggered

By Al Holzinger

Start buying filing boxes and cabinets because the paperwork avalanche triggered by enactment of the 1986 Immigration Reform and Control Act is about to reach your office.

Beginning June 1, even the smallest businesses must verify the citizenship status of new hires—Americans and aliens—within 24 hours of employment and retain a related government form for at least three years, according to preliminary regulations issued in late January by the Immigration and Naturalization Service (INS).

The regulations, which may be revised somewhat in mid-April in response to public and congressional comments, will implement a law enacted last Nov. 6. The statute prohibits the hiring of illegal aliens but provides amnesty to aliens who have resided in the United States illegally since

Under the rules, each job applicant must fill out and sign a form, designated I-9, that provides "biographical information" and attests, under penalty of perjury, that the applicant is a U.S. citizen or an alien authorized to work in the United States.

The form must be supported by a document that proves both identity and work eligibility: a current U.S. passport, a certificate of U.S. citizenship or naturalization or an unexpired foreign passport bearing an INS employment authorization stamp.

If an applicant does not have one of these documents, identity may be proved with one document and work eligibility with another. Valid identification includes a driver's license, state-issued ID card or notice of discharge from the U.S. armed forces. Work eligibility can be proved with a Social Security card or birth certificate.

Employers must sign form I-9 "no later than 24 hours after commencement of employment," say the regulations, to certify that documents produced by the new hire "reasonably appear on their face to be genuine." Employers also must retain this form for three years or for one year after the termination of employment, whichever is longer.

Forms I-9 must be produced "immediately" for inspection upon request of INS or Department of Labor officials. No subpoena, warrant or advance notice is required.

From June 1, 1987, through May 31, 1988, employers will be issued a warning for a first offense. After that, hiring of illegal aliens will be punishable by fines of $250 to $1,000 per employee.

Learn how to cope with this complex, far-reaching new law through the U.S. Chamber's useful, easy-to-use new publication, "The New Immigration Law: An Employer's Handbook." Order before April 1 at the pre-publication price of $15 a copy. After this date, the price will be $20 for Chamber members and $35 for non-members. Send your prepaid order to Employee Relations Policy Center, U.S. Chamber of Commerce, 1615 H St., N.W., Washington, D.C. 20062. Make your check or money order payable to the U.S. Chamber. Orders will be shipped about May 15.

APPENDIX 5

U.S. CHAMBER OF COMMERCE

Business-Government Policy Department

February 5, 1987

Office of Investigations
Immigration and Naturalization Service
Washington, D.C. 20536

Dear Commissioner Nelson and staff:

Attached are the Chamber's early, informal and preliminary comments on the preliminary working draft of the employer sanctions proposed regulations. We will provide more formal and official comments when they are published in the Federal Register.

1. Texas proviso issue. Clarification is necessary on the prosecutorial discretion or enforcement use of the statutory deletion of the "Texas proviso". All public statements have seemed to indicate that an employer cannot be penalized for those hired prior to November 6, 1986, although a new enforcement scheme based on this specific change in the law could render such advice or guidance meaningless.

2. I-9 Form. First, the latest version of the form appears far more complicated and burdensome than the business community was led to believe would evolve. Congressional staff had promised a simple, half-page form that could be completed with minimal effort. The evolution of the proposed form is a major concern of ours at this early date. We would encourage you to consider allowing employers to use their own form if it can also meet the legal requirements of verification. Certainly, the INS form should be widely distributed and widely used; however, employers without immediate access to the official form should not be disadvantaged by that administrative problem if they attempt to comply with the behavior required in P.L. 99-603. Small businesses may be aided the most by this type of leniency incorporated into the regulations.

3. Hiring Hall provision. The Chamber feels strongly that whereas state employment agencies can certify that they have verified applicants, union hiring halls should be required to do the same sort of verification when referring union members -- alleviating the employer's verification process.

4. 24-hour grace period. Because few American citizens — the vast majority of those who will be verified by employers — have the proper paperwork readily available on a 24-hour notice, we would recommend a more flexible grace period. Perhaps the approach could be "within a reasonable time frame" but excluding cases involving the intentional or negligent abuse of such discretion. What we are concerned about is the time it will take the Social Security Administration to process a request for a duplicate Social Security card.

5. Definitions. If the definitions of "employee" and "employer" could effectively exclude part-time employees, temporary employees, intermittent employees, leased employees, independent contractors and subcontractors — each of whom would be the responsibility of the more direct employer -- we believe liability could be more fairly assessed.

6. Notice prior to inspections. A warrant, subpoena and/or notice of inspection should be made a part of the inspection process. Again, a reasonableness standard should be incorporated into the inspection notification process taking into account an employer's business activity at the time of inspection and whether it would be economically feasible to provide access at such time.

7. Verifying applicants or new hires? Clarification of an employer's responsibility to verify documents on those HIRED is necessary. The paperwork responsibility and burden differs tremendously when applicable to applicants as well as those hired.

8. Inventory checks of an entire workforce. Nothing in the statute, with the possible exception of the "Texas proviso" issue raised earlier, would encourage an employer to check documents on all employees currently in a work force. This should be stipulated in the regulations to minimize paperwork and possible discrimination liability.

9. Handling newly hired workers between November 6, 1986 and May 31, 1987. The Chamber would strongly urge that until the proper forms and adequate education are available, an employer cannot be penalized for improper paperwork or the employment of undocumented workers. The citation period begins June 1, 1987 and no employer should be fined for paperwork violations or negligent hiring practices prior to the time when a full scale education effort has been completed.

10. Action with a suspicious document. Major practical problems can be expected regarding an employer's liability for the genuineness of any particular document. Employers will not be familiar enough with the numerous documents they will be "verifying" for a long time. Of considerable concern to the U.S. Chamber of Commerce is clarifying whether it would be best for an employer to error on the side of acceptance or rejection in the case of an uncertain document. On one hand, such an employer runs into liability from INS for knowingly hiring

an illegal alien and on the other hand, the employer faces discrimination liability from the Special Counsel or EEOC. This practical dilemma could be the Number One problem our members will face and must be better clarified in the ultimate regulations.

In addition, we would recommend your considering a means of protection for that employer who makes some effort to report a suspicious document or who has a verification question that they attempt to resolve with a local INS office. What will the procedure be and what protection can be institutionalized?

11. Rehires. To minimize the paperwork burden, particularly on those with high rates of labor force turnover, we encourage you to consider a "one time per person" verification requirement accommodating those employees who are hired, who take a leave of absence, who transfer from one office to another within a larger organization with separate hiring practices, etc...

12. Aiding the employee eligible for amnesty. Similar to the dilemma raised above in Number 10, will an employer be exposing him or herself to liability for acknowledging the continued employment of an undocumented worker? Is there any legal obligation to assist that individual attempting to gain amnesty? If the employer assists the individual, will there be additional governmental intervention or investigation on that employer's tax liability or Social Security payments, etc...?

13. Administrative concerns. A decision by the INS not to act on a complaint should be considered final and should not be subject to administrative or judicial review. INS and DOL should have a specified and limited time to act after a complaint has been filed. There should also be a limited time period in which someone can file a complaint.

14. Maintaining forms. The regulations should specifically encourage employers to maintain and consolidate verification forms at a central location rather than at each particular facility where hiring may take place. On the other hand, if separate records are kept at separate places for separate employees, the regulations must be flexible enough to allow for the mailing of such documents upon request to the central headquarters.

15. Separate facilities. When considering assessment of fines or penalties, the regulations should acknowledge that where separate hiring practices occur, fines and penalties should be separately assessed also. Flexibility on this practical and complicated problem is important.

16. Other points of interest.

- Informal recruiting and referring efforts by employers should not be subject to verification requirements.
- Name changes (i.e. marriage) should not affect the validity of documents.
- Expired passports should qualify as valid identification documents.
- Maintaining verification documents or the I-9 on microfiche should be allowed.
- Clarification of the "subcontracting" clause's exposure of liability must be made.

17. Other comments concerning the I-9 form. The boxes give the impression that each box needs to be filled in. Excessive information is required in this proposed draft of the I-9, based on earlier versions of the form that we saw.

In Section F on the form, we encourage you to delete the final or third clause attesting to the fact that the employee is a U.S. citizen, a legal permanent resident, or a non-immigrant alien with authorization to work.

It has also been suggested that you list all the possible verifying documents on the back of your form.

Have you explored the possibility of incorporating this form's requirements into that of the new W-4 form from the IRS.

Again, I want to reiterate that these are not the Chamber's formal comments, but are an informal attempt to give you some first impressions of the problems we have with the proposals. If we can be of further assistance, please know that you can contact us at any time.

Virginia B. Lamp

Virginia B. Lamp
U.S. Chamber of Commerce
(202) 463-5500

Senator KENNEDY. Just on that point, I thought it was reasonable notice that was going to be the standard used by the INS. If it is not that, and you have other information, we will come back to that, but I thought that was the standard.

Mr. Henderson?

STATEMENT OF ACLU

Mr. HENDERSON. Mr. Chairman, thank you, and members of the subcommittee. I am Wade Henderson, with the American Civil Liberties Union, and I thank you for this opportunity.

The enactment of the new immigration law provides both opportunity and difficulty for civil rights and liberties. The great opportunity over the next twelve months is to legalize several million undocumented persons who are eligible under the provisions of the new law.

The danger is that employers have begun to discriminate against workers based on their national origin or citizenship status for fear of violating the new provisions against hiring unauthorized aliens.

Today, I would like to focus our attention on an especially egregious problem, and that is the Department of Justice's implementation of the anti-discrimination provisions of the new Act.

At their core, the regulations represent a blatant attempt to write the law through the regulatory process. Now, before addressing what the proposed regulations say, I think it is appropriate to note what they do not say.

Specifically, there is no indication that the Justice Department has even begun to establish the Office of Special Counsel mandated by Congress almost 5 months ago, despite the growing evidence of job discrimination caused by the Act. Without an Office of Special Counsel, the proposed regulations have no practical effect.

Moreover, the proposed regulations apparently do not envision the immediate establishment of regional offices for the special counsel, although they do permit such offices in the future if the counsel so desires. This is particularly disturbing, given the mounting evidence of nationwide employment discrimination arising from the implementation of the new Act.

UNNECESSARY JOB FIRINGS

For example, in a recent survey by Business Week Magazine, it found widespread evidence that many small and medium-size employers and businesses are firing alien workers en masse to escape the threat of sanctions, even though employers are not liable for undocumented workers hired prior to November 6, 1980.

In New York, the Governor's Task Force on Immigration Affairs has documented 64 cases of discrimination under the new Act. The report noted that several factors have fostered acts of discrimination under the law: the absence of Federal regulations interpreting the Act, employer ignorance of the provisions of the law, the failure of the Justice Department to appoint a special counsel in particular has contributed to problems.

Some persons who are eligible for legalization are being fired from their jobs as well. The problem arises when employers seek verification of the status of individuals hired prior to November 6, 1986, even though the law does not mandate it. This is occurring, in spite of the so-called "grandfather clause" covering employee verification requirements.

One such report was noted recently in a New York local newspaper. It involved a Haitian undocumented worker who has been in this country since 1980, and was dismissed from a job he had held since 1981 because he did not have documentation. The INS said it could not provide documents of work authorization for persons in this gentleman's circumstance.

The problem was of sufficient magnitude to prompt litigation in a nationwide class action suit, and fortunately this element of the lawsuit has been settled and the INS has agreed to permit persons in this situation to self-certify their intent to apply for legalization.

However, the problem cannot be fully resolved without an extensive public education campaign directed particularly toward the employer community.

LACK OF PUBLIC EDUCATION

Now, a lack of significant public education by the INS has become unfortunately a contributing factor in the emergence of discriminatory employment practices under the new law.

An example of the potential for increased discrimination under the Act is reflected by a recently obtained internal memorandum from a national accounting firm, which I have included as an attachment. The memorandum, dated April 3rd, states that the new law requires that each employer must establish both the employment authorization and identity of each individual hired since November 6, 1987. Consequently, the recipient is instructed to produce for copying the following documents by no later than April 15, 1987: an official birth certificate, a social security card, and either an original driver's license or a U.S. passport.

Suffice it to say that the memorandum is deeply disturbing for several reasons. First, the Act does not mandate the photocopying of documents, and that is certainly not the understanding of the law as we have it. More importantly, the memorandum completely omits the mention of numerous documents that are issued to a foreign-born person or authorized alien and that satisfy the requirements of the new law. Now, failure to include these among the designated documents will cause an employer, either intentionally or unwittingly, to discriminate against persons on the basis of their citizenship status or national origin. The accounting firm's memorandum has been rescinded but only because it came to the attention of our office and we are now encouraging obviously the employer community to look carefully at its requirements under the law.

Perhaps most troubling of all is the proposed regulations attempting to interpret the requirement that only intentional acts of discrimination are prohibited. The legislative history of the new law I think is well known obviously to the members of this committee and I will not repeat that, but I will emphasize that the standard of discriminatory effect or impact is the standard that is embodied in title VII of the Civil Rights Act of 1964, which served as the model for the anti-discrimination provisions of the Act.

In its preamble of the proposed regulations, the department acknowledges the relationship between title VII and the new immigration law, but argues that its particularly relevant subsection in fact requires discriminatory intent. This argument has been directly rejected by two Federal courts, including one circuit court decision issued only a few weeks prior to these proposed regulations.

There are two other points to be made. I will not elaborate on the written statement at this time. I will be happy to respond to questions. Thank you very much for this opportunity.

[Joint statements of Messrs. Henderson and Guttentag, with attachments, follow:]

STATEMENT OF

WADE J. HENDERSON
ASSOCIATE DIRECTOR
WASHINGTON OFFICE

and

LUCAS GUTTENTAG
NATIONAL LITIGATION COORDINATOR
IMMIGRATION AND ALIENS' RIGHTS TASK FORCE

ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Subcommittee:

On behalf of the American Civil Liberties Union, we would like to thank the Subcommittee for the opportunity to discuss the proposed federal regulations implementing the Immigration Reform and Control Act of 1986 ("IRCA" or "Act").

The enactment of the new immigration law provides both opportunity and difficulty for civil rights and liberties. The great opportunity over the next 12 months is to legalize several million undocumented persons who are eligible under the provisions of the new law. The danger is that employers have begun to discriminate against workers based on their national origin or citizenship status for fear of violating the new provisions against hiring unauthorized aliens. Although the ink is barely dry on the Act, there is already controversy brewing over the scope of its legalization program and the meaning of the law's crucial anti-discrimination language.

Like many other groups, the ACLU has several specific interests in the Act, with a particular emphasis on legalization and the prohibitions against discrimination. The Civil Liberties Union is also deeply concerned with the range of privacy implications of the new law, which we will discuss briefly later in the separate memorandum to the Subcommittee.

However, today we would like to focus our attention on an especially egregious problem: the Department of Justice's implementation of the antidiscrimination provision of IRCA. The Reagan administration did not support these antidiscrimination measures in Congress; and the proposed regulations reflect that apparent hostility. At their core, the regulations represent a blatant attempt to rewrite the law through the regulatory process.

Evidence of Discrimination

Before addressing what the proposed regulations say, it is appropriate to note what they do not say. Specifically, there is no indication that the Justice Department has even begun to establish the Office of Special Counsel mandated by Congress almost five months ago, despite the growing evidence of job discrimination caused by the Act. Without an Office of Special Counsel, the proposed regulations have no practical effect. For example, the regulations detail who may file a discrimination complaint and what the complaint must include. Under the heading "how to file," however, the regulations state only that the Special Counsel's address is still "to be determined." 28 C.F.R. Sec. 44.300(c).

Moreover, the proposed regulations apparently do not envision the establishment of regional offices for the Special Counsel. Such a restriction would impose an onerous procedural burden on the injured party by directing all complaints to a central office, probably here in Washington, D.C. This is particularly disturbing given the mounting evidence of nationwide employment discrimination arising from the implementation of IRCA:

In a national survey noted in the March 30, 1987 edition, *Business Week* found widespread evidence that many small and medium-size businesses are firing alien workers en masse to escape the threat of sanctions, even though employers are not liable for undocumented workers hired prior to November 6, 1980, and even though many of the discharged workers may be eligible for legalization.

* In New York, the Governor's Task Force on Immigration Affairs, which is focusing on the implementation of the new law has documented sixty-four (64) cases of discrimination under IRCA. The report to the Governor noted that several factors have fostered acts of discrimination under the new law: the absence of federal regulations interpreting the IRCA; employer ignorance of the provisions of the IRCA; the failure of the Justice Department to appoint a Special Counsel to deal with these problems; and the lag in establishing guidelines for addressing such issues.

* Some persons eligible for legalization are being fired from their jobs. The problem arises when employers seek verification of the status of individuals hired prior to November 6, 1986, even though the law does not require it. This is occurring in spite of the so-called "grandfather clause" covering employee verification. One such report was noted recently in the *New York Amsterdam News* on February 28, 1987. It involved a Haitian undocumented worker, Julian Bernardin, who has been in this country since 1980, and was dismissed from a job he had held since 1981 because he did not have documentation. The INS, it said, could not provide documents of work authorization for persons in Bernardin's circumstance.

The problem was of sufficient magnitude to prompt litigation in a nationwide, class action lawsuit, *Catholic Social Services v. Meese*, involving interim work authorization for legalization-eligible aliens. Fortunately, this element of the suit has been settled, and the INS has agreed to allow persons in this situation to "self-certify" their intent to apply for legalization for a brief period. The settlement should significantly ameliorate the harm being suffered by persons who will qualify for legalization, but who have had no means to obtain work authorizations. The problem cannot be fully resolved, however, without an extensive public education campaign directed particularly toward employers.

A lack of significant public education by the INS has become a contributing factor in the emergence of discriminatory employment practices under IRCA. Although the ACLU and other organizations have initiated campaigns to educate employers in an effort to minimize these difficulties, such efforts cannot hope to have the scope or effectiveness of a governmentally-sponsored employer education campaign.

An example of the potential for increased discrimination under IRCA is reflected by a recently obtained internal personnel memorandum from a national accounting firm. The memorandum, dated April 3, 1987, states that IRCA requires that each employer must establish both the employment authorization and identity of each individual hired since November 6, 1987. Consequently, the recipient is instructed to produce for copying, the following documentation by no later than April 15, 1987: an official birth certificate, a social security card, and either an original driver's license or U.S. passport. See Attachment I.

Suffice it to say that the memorandum is deeply disturbing. The procedure to mandate the photocopying of documents is certainly not required under IRCA. More importantly, the memorandum completely omits mention of numerous documents that are issued to a foreign-born person or authorized alien and that satisfy the requirements of the new law. For example, IRCA and the proposed implementing regulations provide that a foreign passport with a work authorization stamp, and an alien registration receipt card ("green card"), or a certificate of naturalization are as acceptable as a U.S. passport for establishing identity and work authorization. Failure to include these among the designated documents will cause an employer -- intentionally or unwittingly -- to discriminate against persons on the basis of their citizenship status or national origin. This memorandum was rescinded only because it came to the attention of the ACLU. See Attachment II.

Recently, the Equal Employment Opportunity Commission (EEOC) issued a policy statement on the Title VII implications of IRCA, and warned against employment practices which may discriminate, even unintentionally. The EEOC policy statement is most welcome. Let us hope that its content receives wide distribution and that its promise of vigorous enforcement for problems under IRCA becomes a reality.

Standard of Proof

Even more troubling, the proposed regulations interpret the Act to prohibit only intentional discrimination. 28 C.F.R. Sec. 44.200(a). This may reflect the civil rights agenda of the Reagan administration; it does not reflect the will of Congress, which prohibited employment decisions that have a discriminatory effect, whether the effect is consciously intended or not.

Section 274B was introduced as an amendment to IRCA by Representative Barney Frank (D-MA) in response to the concern that the employer sanctions provisions of the Act would result in discrimination in employment against non-citizens, ethnic minorities, or anyone perceived by an employer as looking or sounding "foreign." Congress concluded that existing federal statutes were not sufficient to address this concern because many small employers are exempt from the prohibitions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq. ("Title VII"); because Title VII and other federal statutes do not unambiguously prohibit discrimination on the basis of alienage or citizenship status; and because federal court actions to enforce existing statutory prohibitions are slow and costly. Section 274B expands the substantive protections of Title VII and institutes a speedy and less expensive administrative remedy.

The standard of discriminatory effect or impact is the standard embodied in Title VII of the 1964 Civil Rights Act, which served as the model for the antidiscrimination provisions of the Immigration Act. In its preamble to the proposed regulations, the government acknowledges the relationship between Title VII and the Immigration Act but argues that the particularly relevant subsection of Title VII in fact requires discriminatory intent. This argument has been directly rejected by two federal courts, including one Circuit Court decision issued only a few weeks prior to these proposed regulations. See Colby v. J.C. Penney Co., Inc., ___ F.2d ___ (7th Cir. February 10, 1987) (No. 86-1500); Wambheim v. J.C. Penney Co., Inc., 705 F.2d 1492 (9th Cir. 1983).

The proposed regulations further require that a discrimination complaint be filed within 180 days of the alleged act of discrimination. 28 C.F.R. Sec. 44.300(b). This time period is a short one in any event. It is especially short since the question whether a particular complaint must be filed with the Special Counsel's Office or instead with the Equal Employment Opportunity Commission is a technical and difficult one that may turn on facts that are not readily available to the average complainant -- e.g., how many employees have worked for how many weeks for a given employer, and if they are truly employees or instead independent contractors. As a matter of elementary fairness, the regulations ought to include a tolling provision to protect a victim of discrimination who files in good faith within the time period but with the wrong agency. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). At present, there is no tolling provision in the proposed regulations.

Finally, a sample discrimination complaint form is attached to the proposed regulations. 28 C.F.R. Part 44, Appendix A. Current plans provide that the form will be available in English and Spanish. Id. We recommend that it be made available, as well, in any language spoken by more than 5% of the population in a given state or municipality. In New York City, for example, standardized complaint forms should be available in Chinese. This broader availability mirrors the provisions of the Voting Rights act, 42 U.S.C. Sec. 1973(b)(f)(3), and will help to achieve the antidiscrimination aims of Congress.

One last point should be made. The proposed regulations also go beyond the statute in permitting both INS and the Department of Labor to inspect employment records without a "subpoena, warrant, or advance notice ..." 8 C.F.R. Sec. 274a.2(b)(2)(B)(ii). Most employers will presumably consent to produce their records. Absent consent, however, our constitutional tradition demands a search warrant based on probable cause or at least an administrative warrant to protect legitimate privacy rights and avoid harrassment. The expectation of privacy is admittedly less in a business than a home. But the Supreme Court has repeatedly held that the Fourth Amendment applies even to commercial premises. In particular, the Supreme Court has explained that the purpose of an administrative warrant requirement is to provide assurance "from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral standards." Marshall v. Barlow's Inc., 436 U.S. 307, 323 (1978). The same considerations apply with equal force in this context.

Thank you for your consideration of these views.

[redacted]

Form O-119 (Rev. 06/85)

ATTACHMENT I

INTEROFFICE COMMUNICATION

Circulate Noted

File Instructions

Acknowledgment Copy

By ______________

TO [redacted] OFFICE FROM [redacted] OFFICE

FOR [redacted] FROM [redacted]

DATE APRIL 3, 1987 JOB OR ACCOUNT NO.

SUBJECT IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA)

On November 6, 1986, the President signed into law the Immigration Reform and Control Act. This act requires that each employer establish both the employment authorization and identity of each individual hired since that date. We therefore must request that you bring to [redacted] (room [redacted]) or [redacted] (room [redacted]) three items; an official certificate-of-birth, a Social Security card, and your original driver's license or United States passport. These documents will be photocopied for our files and returned to you immediately. It is imperative that this be done as soon as possible - no later than April 15, 1987.

If you have any problems meeting these requirements by April 15, promptly contact [redacted] on extension [redacted] as these documents are not readily obtained.

[redacted]

[redacted]

ATTACHMENT II

ACLUF

National Headquarters
132 West 43 Street
New York, NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

Lucas Guttentag
NATIONAL LITIGATION COORDINATOR
IMMIGRATION AND ALIENS RIGHTS
TASK FORCE

April 8, 1987

[redacted]

Dear [redacted]:

This will confirm our telephone conversation of this afternoon, wherein you agreed to rescind your memorandum of April 3, 1987, and to not require the production of any documentation from new employees until the official Immigration Service forms and instructions are available in June.

Thank you for your cooperation.

Sincerely,

L Guttentag

Lucas Guttentag

Senator **Kennedy**. Thank you very much. Senator Simon would like to make a statement.

STATEMENT OF SENATOR SIMON

Senator **Simon**. Mr. Chairman, may I insert a statement in the record? I have to go to another meeting. Let me just add that it does seem to me that as we look at this, that not only is the fee structure going to have to be modified a little bit, but we are going to have to give some greater flexibility to the Commissioner so that we do not end up with some real damage to people who fall through the cracks in this process.

I do not think, either through regulation or statute, we are going to be able to solve all types of problems that are coming up.

Thank you.

Senator **Kennedy**. Thank you very much, Senator Simon. We look forward to working with you on these issues.

Charles Kamasaki?

STATEMENT BY NATIONAL COUNCIL OF LA RAZA

Mr. **Kamasaki**. Thank you, Mr. Chairman.

My name is Charles Kamasaki, and I am Director of Policy Analysis for the National Council of La Raza.

My oral testimony today will focus on three broad themes with resect to implementation of the legalization program. First, the proposed regulations implementing the program are unacceptable; second, the capacity and resources, the infrastructure, if you will, necessary for effective implementation are insufficient; and, finally, the lack of public education efforts is aggravating widespread confusion and misunderstanding of the law and undermining the purposes of the legalization program.

With respect to the proposed regulations, we believe those published on March 19th are substantially better than the preliminary draft regulations issued early in the year. However, they are still far too restrictive; allow me to discuss two examples.

First, the definition of the "brief, casual and innocent" exception to the "continuous physical presence" requirement is clearly unwarranted. The proposed regulations state that only absences which are [1] authorized by INS; [2] for "legitimate emergency or humanitarian purposes"; and [3] not longer than 30 days, unless a longer period is expressly granted by INS, will be considered "brief, casual and innocent."

The effect of this definition would be to exclude a substantial proportion of the eligible population. It is a common practice for many undocumented aliens, especially those residing in border areas, to visit family and friends abroad during the Christmas holidays. Others may have left the country briefly after November 6th for other reasons—again, a common practice this time of year, since many seasonal industries, including agriculture, packing, canning and processing, shipping, construction and others, shut down over the winter.

Little notice was given to potential applicants that any absence without prior INS authorization would make them ineligible for the program. In fact, in the wake of the bill's passage, INS urged potential applicants not to come to their offices to apply or to obtain information.

Moreover, the legislative history does not support the prior authorization requirement; indeed, Congress carefully included a confidentiality provision designed to ensure that applicants need not reveal their identities to the service before applying or during the initial stages of the application process. It is illogical to assume that Congress would have required applicants to expose themselves to INS enforcement before applying, while allowing them to protect their identities during the application process itself.

DOCUMENTATION REQUIREMENTS

Secondly, we believe that the documentation requirements are unreasonable. Given that this population has previously sought to avoid detection and the creation of "paper trails," the documentation provisions in the proposed regulations, we believe, are unduly restrictive.

Many undocumented aliens have worked "off the books" and were paid in cash, at least for some part of their residence in the United States. Many others have worked for firms that have changed ownership and/or management, have moved to a different location, or that no longer exist. These persons, in all probability, will not be able to obtain the preferred documents.

Even those persons lucky enough to locate their previous employers are likely to have great difficulty in meeting the rigid formula that the proposed rules require. The requirement for certain items that may not be known to the employer, for example, the alien's address at the time of employment, may prevent employers from providing documents.

The dual requirements for both an attestation under penalty of perjury and a statement indicating an "employer's willingness to come forward and give testimony" are redundant, and will deter many employers from assisting legalization applicants, especially given many employers' fears, both real and imagined, of potential enforcement for immigration and other violations.

The early experiences of organizations carrying out "preregistration" activities confirms the restrictiveness of these documentation provisions. Lawyers with the International Ladies Garment Workers Union, for example, have estimated, based on actual experience with their members, who by virtue of their union status should be among the "easiest" applicants to document, that only 20 percent of those screened to date can obtain the requisite employment documents.

LEGALIZATION PROGRAM

The National Council has a range of additional concerns regarding the proposed legalization rules which are referred to in my written statement.

With respect to the capacity and resources of the system: In order to ensure that optimum level of participation in legalization, Congress included provisions in the Act requiring the Attorney General to designate qualified designated entities [QDEs] to serve three functions:

First, they are to encourage the undocumented population to come forward and apply for the program; second, such entities are necessary to assist and counsel eligible persons to prepare applications; and, finally, QDEs are a key line of defense against the exploitation of undocumented population by unscrupulous individuals.

Maximizing the capacity of QDEs to perform these functions therefore is synonymous with maximizing the success of the legalization program itself. In this sense, maximizing capacity requires several interrelated actions.

Senator **Kennedy**. You have another minute and a half to finish.

Mr. **Kamasaki**. Thank you.

First, maximizing the number of QDEs; second, ensuring that such entities have the resources to deliver high quality services; and, finally, assisting QDEs to effectively plan and organize their activities.

Unfortunately, the proposed cooperative agreement issued implementing the QDE structure is unworkable. The effect on National Council of La Raza's network, Mr. Chairman, is that only 5 of 26 interested groups have committed to participate in the QDE program. As a result, we believe outreach will be significantly reduced, the quality of services will be reduced, cost to applicants will increase, and exploitation will also increase.

PUBLIC INFORMATION

Finally, with respect to public information, the INS this week finally awarded a contract to carry out its long-awaited public information campaign. While we are obviously pleased that the contract has been awarded, we believe it represents an extreme example of the old saying a day late and a dollar short; indeed, it is many days late and many dollars short.

My written testimony refers to a range of recommendations and I will end at this time. Thank you.

[The prepared statement of Mr. Kamasaki follows:]

STATEMENT OF CHARLES KAMASAKI
DIRECTOR OF POLICY ANALYSIS
NATIONAL COUNCIL OF LA RAZA

I. INTRODUCTION

Mr. Chairman and members of the Subcommittee, I am Charles Kamasaki, Director of Policy Analysis for the National Council of La Raza. The National Council is a Washington, D.C.-based, nonprofit organization dedicated to improving the socio-economic status of Americans of Hispanic descent. The National Council represents local community-based organizations operating in 32 states, the District of Columbia and Puerto Rico, who together provide education, employment, health, housing, community development, immigration and social services to about one million Hispanics annually.

As you are aware, the National Council has spent a great deal of time studying, and has produced a series of analyses and testimony on, immigration issues. We have done so for two reasons. First, immigration laws affect Hispanics -- for better and for worse -- more than any other ethnic group. Second, Hispanics have an affirmative interest in effective immigration reform. The legalization of the highly vulnerable subclass of undocumented persons living in this country has been the top legislative priority of the National Council for the past five years. We therefore have a profound interest in the implementation of the Immigration Reform and Control Act, and wish to thank the Chairman and the Subcommittee for this opportunity to express our views.

My testimony today will focus on three broad themes:

- The proposed **regulations** implementing the Act are unacceptable;
- The **capacity and resources**, the "infrastructure," necessary for effective implementation are insufficient;
- The lack of **public education** efforts is aggravating widespread confusion and misunderstanding of the law.

The National Council believes that the combination of unacceptable regulations, insufficient capacity and resources, and lack of public information threatens to undermine the purposes of the Act.

II. LEGALIZATION

A. Overview

Mr. Chairman, I would first like to review the rationale for legalization. As the Subcommittee is well aware, an effective legalization program would:

- Reduce the highly exploitable subclass of undocumented persons, the existence of which is harmful to the society as a whole;
- Enable the Immigration and Naturalization Service (INS) to redirect scarce resources away from interior enforcement — which is inefficient, costly and threatens the civil rights of aliens and citizens alike — toward border enforcement, which is more cost-effective and humane;
- Permit employers dependent on this pool of labor to continue to use it, but on a lawful basis; and
- Provide comprehensive information about this population, which is essential for deterring future flows of undocumented migrants.1

There are, to be sure, humanitarian and ethical considerations as well. Massive deportation or "repatriation" campaigns are not only impractical, but likely to result in wholesale violations of civil rights. Moreover, those persons eligible for the program have built up equities in this country; they work hard, they pay taxes, and are otherwise law-abiding, contributing members of society.

In sum:

- **An effective legalization program is in the public interest;** and
- **Legalization can be effective only if a significant proportion of the eligible population successfully adjusts its status.**

Before going into specifics, we believe it would be useful to review the legalization experiences of other countries which have carried out similar programs. In a well-received recent analysis of such programs, former INS Acting Commissioner Doris Meisner and immigration scholars Demetrios Papademetriou and David North summarized the results of legalization programs of seven countries; based on a consultation with immigration experts both here and abroad sponsored by the Carnegie Endowment for International Peace. They found that:

> In every case, the number of people who applied for legalization was less (by up to one-half or more) than expected. The reasons cited by foreign immigration experts include the following: confusion or fear about eligibility requirements, limited participation by organizations trusted by immigrant communities, inadequate time and funds for publicity and outreach....2

The beginning of our own legalization program is less than one month away; unfortunately, we appear to be repeating the mistakes of other countries' programs, rather than learning from them.

B. Proposed Regulations

While the proposed regulations published on March 19 are substantially improved over the preliminary draft regulations issued earlier in the year, they are still far too restrictive; allow me to discuss several examples.

First, the definition of the "brief, casual and innocent" exception to the "continuous physical presence" requirement is unwarranted. The proposed regulations state that only absences which are (1) authorized by INS; (2) for "legitimate emergency or humanitarian purposes"; and (3) not longer than 30 days (unless a longer period is expressly granted by INS) will be considered "brief, casual and innocent."

The effect of this definition would be to exclude a substantial proportion of the eligible population. It is a common practice for many undocumented aliens, especially those residing near the border, to visit family and friends abroad during the Christmas holidays. Others may have left the country briefly after November 6, 1986, for other reasons — again, a common practice this time of year since many seasonal industries, including agriculture (except citrus), packing, canning and processing, and construction, shut down over the winter.3

Little notice was given to potential applicants that any absence without prior INS authorization would make them ineligible for the program. In fact, in the wake of the bill's passage, INS urged potential applicants not to come to INS to apply or to obtain information.

Moreover, the legislative history does not support the prior authorization requirement; indeed, Congress carefully included a confidentiality provision designed to ensure that applicants need not reveal their identities to INS before applying or during the initial stages of the application process. It is illogical to assume that Congress would have required applicants to expose themselves to INS enforcement before applying, while allowing them to protect their identities during the application process itself.

Second, we believe that the documentation requirements are unreasonable. Evidence of identity is limited to seven specified documents, listed in descending order of preference. Employer letters and attestations from institutions to prove residence are required to follow a rigid formula, including items that may be burdensome to require or that may not be known to the person or entity completing the form.

Given that this population has previously sought to avoid detection and the creation of "paper trails," the documentation provisions in the proposed regulations are unduly restrictivo. Using employment related documents as an example (such documents are preferred in proving continuous residence), it is clear that the proposed regulations would deter many eligible applicants from applying, and would deny legal status to many others who did apply.

Many undocumented aliens have worked "off the books," and were paid in cash -- at least for some part of their residence in the United States. These persons would not be able to obtain the preferred documents.

Many others have worked for firms that have changed ownership and/or management, have moved to a different location, or that no longer exist. These persons, in all probability, will not be able to obtain the preferred documents.

Even those persons lucky enough to locate their previous employers are likely to have great difficulty in meeting the rigid formula the proposed rules require. The requirement for certain items that may not be known to the employer, e.g., alien's address at the time of employment, may prevent employers from providing documents. The dual requirements for an attestation under penalty of perjury and a statement indicating an "employer's willingness to come forward and give testimony" are redundant, and will deter many employers from assisting legalization applicants, especially given many employers' fears -- both real and imagined -- of potential enforcement for immigration and other violations.

The results of these onerous documentation requirements are already beginning to emerge. Published reports have identified otherwise eligible persons who may not qualify under the restrictive documentation provisions.[4] One immigration lawyer in Houston has estimated that 80% of those eligible for legalization will have "moderate to severe document problems."[5] A forthcoming documentary portrays the problems that eligible persons are having in documenting their residence.[6]

The early experiences of organizations carrying out "pre-registration" activities confirms the restrictiveness of the documentation provisions. Lawyers with the International Ladies Garment Workers Union have estimated, based on actual experience with its members -- who, by virtue of their union status should be among the "easiest" applicants to document -- that only 20% of those screened to date can obtain the requisite documents.[7]

Third, excessive fees -- especially when combined with restrictive regulations -- may deter many persons from applying, particularly those with difficult or marginal cases.

The proposed rules contain a fee schedule of $185 for an individual application, a $50 fee for each minor child, and a family rate of $420. The INS justifies the proposed fee schedule by suggesting that such fees are comparable to those paid by legal immigrants, and are negligible compared to the benefit received by the individual, i.e., legal status.

The INS position is unjustified on several counts. First, it misleadingly compares two different procedures. The $185 fee for a visa ($35 for the petition; $150 for the visa) is not the same as $185 for a legalization application. Fees for comparable procedures, e.g. $50 for registry or $85 for a simple adjustment of status petition, are much lower.

Second, the INS position misleadingly compares two different benefits. The legal immigrant immediately obtains full permanent resident status. If successful, the legalization applicant will obtain temporary status, then will have to apply for permanent status and presumably pay another fee.

Third, if legalization were a certainty for most applicants, we would be less concerned about the fee schedule. Unfortunately, given restrictive regulations, few legalization applicants are likely to have "open and shut" cases. Many, perhaps most, legalization applications are likely to be difficult; many persons who are clearly eligible are likely to have "marginal" applications, given the proposed rules. In this context, many -- perhaps most -- potential applicants, faced with severe doubts about their ability to qualify, are likely to view $185 as too high a price to pay for an application that may be denied.

Fourth, the assertion that the magnitude of the benefit received by legalized persons exceeds $185 is incomplete. It ignores numerous other costs -- medical examinations, counseling or attorney's fees, document searches, notary's fees, and travel -- that applicants must bear. Conservative estimates of the total cost of legalization are a minimum of $1,000 per individual and $3,000 for a family of four. It is inconceivable to suggest that costs of this magnitude would not impose hardships on what is widely recognized as a predominantly low-income population, or that such costs would not deter eligible persons from applying.

The National Council has a range of additional concerns regarding the proposed legalization rules, including the provisions covering "continuous residence," "public charge," work authorization, and the treatment of ineligible spouses and minor children. Our concerns are more fully described in the attached memorandum dated April 8, 1987, and in other comments and memoranda previously made available to the Subcommittee.8

If legalization was an individual benefit program, the INS' restrictive approach might be justified. This approach ignores the fundamental premises of legalization, i.e., that a successful program is in the public interest; and that a successful program requires the maximum participation of the eligible population. Absent major changes in the regulations, it is clear that many eligible persons will be deterred from applying; many others will apply only to have their applications denied -- not because they fail to meet the statutory criteria -- but because of unduly restrictive and burdensome regulations.

C. Capacity and Resources

In order to ensure the optimum level of participation in legalization, Congress included provisions in the Act requiring the Attorney General to recognize certain "Qualified Designated Entities" (QDEs) to engage in outreach, application assistance, counseling, and initial application processing. QDEs are thus supposed to serve three functions. First, they are supposed to encourage the undocumented population to come forward and apply for the program. The experience of other countries suggests that the existence of the QDE structure is essential to overcome potential applicants' fear of exposing themselves to deportation by applying for the program. The history of INS' relationship with immigrant communities in this country confirms the need for a "buffer" between the Service and potential applicants.[9]

Second, QDEs are necessary to assist and counsel potential applicants to prepare applications. It is increasingly clear that, given the complexity of the regulations, the availability of such counseling will play a critical role in determining whether many eligible persons successfully legalize.

Finally, QDEs are a key line of defense against the exploitation of the undocumented population by unscrupulous individuals. In this context, official QDE status would serve as a "Good Housekeeping Seal of Approval"; the target population could seek assistance from any QDE with substantial confidence that appropriate services would be delivered at reasonable cost.

QDEs thus are designed to carry out several functions essential to the success of the legalization program, and would, in effect, serve as the underlying "infrastructure" for legalization. Maximizing the capacity of QDEs to perform these functions is synonomous with maximizing the success of legalization itself. Maximizing capacity, in this sense, requires several interrelated actions:

- Maximizing the number of QDEs providing services to the target population;
- Ensuring that such entities have the resources to deliver high quality services while minimizing cost to the applicants;
- Assisting QDEs to effectively plan and organize their operations so that they can provide effective services from the beginning through the end of the legalization program.

Unfortunately, the initial draft of the Cooperative Agreement issued on February 27, 1987, and even the somewhat improved version issued March 25, 1987, fail to accomplish any of these objectives.

In short, the Cooperative Agreement is unworkable. It provides for a reimbursement of $15 to the QDE for each completed application submitted. The average outreach and processing costs per applicant -- even if all gather their own documents, fill out their own forms, and need no assistance — is likely to exceed $15. Moreover, it is likely that many persons who seek assistance will not complete applications; some will be ineligible, others will eventually need more sophisticated help from an attorney, and still others may choose to file their applications with other entities. QDEs would not be reimbursed for any of the costs associated with serving those individuals who do not file applications with that QDE.

The Cooperative Agreement also allows QDEs to charge counseling fees not to exceed $75. Under the original Cooperative Agreement, this $75 "cap" was rigid and absolute; after virtually every potential QDE raised objections.10, the INS issued a revised agreement exempting certain costs from the "cap." There is some question whether the revised agreement is acceptable. Estimates of counseling costs range from $100 to $200 per "average" applicant; with some estimates as high as $250.11 Complex cases requiring extensive counseling may exceed these estimates. Given the restrictive regulations, the number of "complex" cases may far exceed the number of "average" ones.

The $15 reimbursement will not cover required costs. The $75 "cap" may prevent QDEs from recovering counseling costs, especially since virtually all QDEs will establish sliding fee schedules based on ability to pay, and since some applicants will be granted fee waivers.

The effects of this process have been devastating. Many local affiliates of national QDEs have already decided not to become QDEs. Others are still undecided, less than one month before the beginning of the program. Some areas of the country with substantial undocumented populations, e.g. Oakland, California, may have no QDEs at all.

With respect to our own network, the Cooperative Agreement has precluded the participation of all but our strongest affiliates. On February 16 and 17, the National Council hosted an "affiliate consultation" in Washington, D.C. Some 26 Council affiliates paid their own way here to learn how to become QDEs. After hearing the specifics of the then-draft Cooperative Agreement from the INS, 13 immediately decided they could not afford to participate in the program. Since then, we have confirmations from only five groups that intend to seek QDE status.

Mr. Chairman, these are organizations that want and need to participate in the legalization program. During our consultation, many stated that they felt compelled to assist legalization applicants. Most already serve the undocumented population; it is clear that they will serve the legalized population. These groups believe in legalization. They want very badly for the program to succeed.

Yet, they cannot afford to risk bankruptcy in order to be QDEs. All operate under serious budget constraints; many operate on "shoestring budgets." Most cannot afford to accept a Cooperative Agreement where the only choices would be to deny services to all but those with "open and shut" cases, provide poor quality "assembly line" service under a program that demands individualized attention, or lose money. Ironically, these are the very kinds of organizations needed to make legalization work. They are trusted in their communities, both for the quality of their service and the depth of commitment to their clients.

Some of our affiliates intend to assist legalization applicants, but without QDE status. But others needed the QDE status -- and the funding, training and technical assistance that should accompany such status -- in order to participate in the program. Those that do participate as QDEs, and those that may do so eventually, will perform effectively. But their effectiveness will be limited by lack of resources and insufficent planning.

The effect of this diminished capacity and the lack of resources will be to undermine the effectiveness of the program, in several key respects:

- Outreach will be significantly reduced. Many persons who might have been encouraged to legalize may choose not to do so in the absence of such outreach efforts;
- Quality of service will be reduced. Agencies operating under the financial constraints imposed by the Cooperative Agreement will have to minimize costs -- by lowering salaries, increasing use of unpaid, untrained volunteers, adopt "assembly line" techniques, etc. Given the complexity of the regulations, some applicants who might have qualified may be denied legalization.
- Costs to applicants will increase. Unable to assist those with difficult applications, QDEs will have to refer a larger proportion to attorneys. Typical legal fees will exceed -- by at least a factor of two -- typical nonprofit agency fees.
- Exploitation of the undocumented will increase. As more nonprofit groups are forced to operate without QDE status, the line between legitimate service providers and unscrupulous, "fast buck" artists will begin to blur. Insufficient capacity will force many persons to seek assistance wherever they can get it. Many of these persons will be charged exhorbitant fees for minimal service; some may be denied legalization as a result. We are already seeing numerous examples of exploitation of the undocumented, which are likely to increase in the absence of sufficient QDE capacity.[12]

It may turn out that, with some critical improvements in the regulations and with the creativity and ingenuity that community-based groups are known for, many QDEs will be able to deliver effective services to most of their clients. It may be that these concerns turn out to be exaggerated. The point is that nobody knows, given the uniqueness of this program. By waiting until March 25 to produce a final version of the Cooperative Agreement, and by imposing unnecessary restrictions on organizations crucial to the success of the program, the INS has already diminished the system's capacity to respond effectively to the challenges posed by legalization, and has truncated an already limited application period.

C. Public Information

On Wednesday, April 8, the INS finally awarded a contract for $10.7 million to a private firm to carry out its long-awaited public information campaign. The campaign is supposed to inform employers of their obligations under the Act, explain the legalization provisions to the undocumented population and encourage them to apply for the program, and to provide a range of information about the bill to the general public.

While the National Council of La Raza is pleased that the contract finally has been awarded, it represents an extreme example of the old saying "a day late and an dollar short." In fact, this action is "many days late." INS initially suggested that the contract was to have been awarded in February, in order to ensure that information was widely disseminated well before the beginning of the legalization program (May 5, 1987) and the citation period for employer sanctions (June 1, 1987). Instead, there are fewer than 30 days left before legalization begins; 30 days to research, design, prepare, market and disseminate information on a bill that affects every employer, every person seeking work, perhaps as many as two million potential applicants for legalization, several hundred thousand undocumented farmworkers eligible for the SAWs program, and countless others -- in short, every person in the United States. Given normal six-to-eight week leadtimes required for major advertising campaigns, it appears that a superhuman effort will be required to get the first advertisements on the air before May 5th; and there is barely sufficient time to prepare for the beginning of employer sanctions enforcement.

Moreover, we are troubled by the size of the contract. Initial INS statements suggested that the contract amount would be $25 million.13 Subsequently, INS predicted a figure of $12-15 million. Now we find the actual contract amount is less than $11 million. Given the enormous scope and complexity of the Act, and massive public confusion about the new law, the National Council is concerned that $11 million may not be sufficient.

The lack of effective public information efforts to-date has grave consequences for legalization. Many employers are laying off employees hired prior to the date of enactment even though they are not required to do so.14 Many of these persons are eligible for legalization, but may be subject to the public charge exclusion if unemployed.

To aggravate matters even further, some ad hoc INS public information efforts have been misleading and inaccurate. One INS spokesperson in California has reportedly stated that:

> ...illegal aliens cannot qualify for amnesty if they've been out of the country more than 30 days or for a total of more than 150 days since January 1, 1982.15

Of course, the official was referring to the preliminary draft rules on the "brief and casual" absences exception for "continuous residence"; the 30/150 day exception has been changed to allow 45/180 day absences in the proposed rules. Presumably, this provision could be changed again. Taken on its face, however, this kind of statement is likely to deter eligible persons from applying, thinking that they do not qualify for the program.

At a recent briefing for employers in a large midwestern city, one employer told me that, when he asked a senior INS District official what he could do to help some of his undocumented employees legalize their status, the official responded by stating, "If you know what's good for you, you'll get rid of all of them."16

Another INS official has responded to news reports of unnecessary terminations by stating, "...it's certainly nothing we're going to try to prevent."17

If accurately quoted, these statements are clearly irresponsible and undermine the objective of maximizing participation in the legalization program. Even if these statements are inaccurately quoted, they demonstrate the dangers of relying on sporadic, ad hoc public information efforts.

In summary, overly restrictive regulations, insufficient capacity and resources and inadequate and inaccurate public information efforts already are working synergistically to limit participation in the legalization program. Unless major changes are made, the National Council believes that the very integrity of the program may be threatened.

If the INS' goal is to legalize the smallest number of persons they can get away with, they are succeeding admirably. Such an approach, however, would be inconsistent with the objectives of the program, and hundreds of thousands of otherwise eligible persons will see the promise of legal status turned into a cruel hoax.

III. EMPLOYER SANCTIONS AND DISCRIMINATION

A. Overview

The same themes identified above apply to employer sanctions and employment discrimination as well. Congress recognized the potential for discrimination resulting from employer sanctions, and attempted to minimize this danger by adopting several key provisions:

- A "uniform verification" process, whereby all new hires would be treated equally under employer sanctions;
- A new anti-discrimination system, designed to provide a system of redress for victims of discrimination on the basis of national origin or citizenship; and
- A public information campaign and a six-month information period, to minimize employer confusion that might lead to discriminatory behavior.

Our concerns about discrimination are not merely theoretical, but based on actual experience. Our previous testimony before this Subcommittee and your counterpart in the other body identified empirical data upon which we based our concerns.[18] While it is too early to assess in a systematic way the scope of such discrimination, preliminary data suggest that Hispanics already may be suffering from acts of employer sanctions-related discrimination.

For example, a recent report of a statewide task force in New York identified more than 60 alleged cases of discrimination resulting from the Act.[19] One Texas rancher was recently quoted in published reports as stating:

> We're going to be real careful about hiring Hispanics, at least I am, because a lot of them appear legal and they're not. This wetback that just left me has a driver's license and a Social Security card, and I know damn well that he was wet.[20]

We are receiving additional reports about discrimination from the press, other national civil rights groups, and our affiliates as well. While we hope we are wrong, we believe that such incidents are only the "tip of the iceberg," representing widespread employment discrimination against Hispanics and others, who on the basis of skin color, speech accent, or other physical characteristics, appear "foreign" to employers.

B. Regulations

Specific issues raised by the proposed regulations implementing the Office of Special Counsel will be covered by other witnesses, are included in the attached memorandum, and will be addressed in the Council's formal comments on the proposed rules.

I wish to address here a fundamental issue raised by the failure of the employer sanctions rules published on March 19 to even mention critical protections against discrimination included in the Act. In attempting to ensure uniform treatment of all individuals hired, Section 274(b)(1)(A) of the Act states:

> If an individual provides a document or combination of documents that reasonably on its face appears to be genuine and that is sufficient to meet the requirements [of the verification provision, i.e., proving identity and work authorization], nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such a document.

The legislative history of this section clarifies its intent:

> ...if the verification requirement procedure is followed, the language is intended to make clear that there is no requirement that an employer request additional documentation or that the employee produce additional documentation.... [D]ocuments that reasonably appear to be genuine should be accepted by employers without... further investigation of those documents.21

Despite numerous requests for the inclusion of this language in the regulations and on the I-9 Form used to verify employees, the proposed rules and the draft I-9 are silent on this issue.22 Omission of this statutory language amidst widespread misunderstanding of the law unnecessarily risks the kind of discrimination that the uniform verification process seeks to minimize.

Failure to clarify employer responsibilities risks the imposition of clearly discriminatory practices, e.g., "citizens only" hiring policies or more subtle requirements, e.g., "passports only" policies or English fluency tests, but encourages employers who fear sanctions to apply stricter scrutiny to documents provided by persons who appear "foreign."

C. Capacity and Resources

To the extent that sanctions lead to increased employment discrimination, it is clear that the capacity and resources to address such discrimination is inadequate. The Equal Employment Opportunity Commission (EEOC) has, to its credit, issued a strong statement warning employers about their liability for discriminatory behavior, although, based on experience, we remain skeptical about EEOC's ability to effectively address employment discrimination against Hispanics.23

The Justice Department, however, has been dragging its feet in establishing the Office of Special Counsel. Despite the fact that the anti-discrimination provisions of the Act were effective immediately upon enactment, a Special Counsel has not been appointed, and proposed regulations were issued on March 23, about five months after the date of enactment. The attached memorandum and other witnesses will describe in greater detail the effects of the delay in establishing the Office of Special Counsel and the failure to issue timely regulations.

D. Public Information

As with legalization, the failure of the INS to implement an effective public information effort is exacerbating regulatory and capacity problems. The evidence cited above suggests that many employers are responding to the sanctions provisions in ways that discriminate against Hispanics and others who fit immigrant stereotypes.

In addition, we fear that many persons authorized to work are not yet fully aware of their obligations under the sanctions provisions. Persons born outside of hospitals -- as is common in the rural South and Southwest and in some parts of Puerto Rico -- may not be able to easily prove their identity unless they are able to acquire documents. Certain "derivatively" naturalized citizens may lack documentary proof of their citizenship, and cannot obtain it without lengthy delays. Still others may have lost birth certificates or other documents, and may not be aware of their legal obligations under employer sanctions. These persons need to be informed immediately of their obligations and procedures for obtaining needed documents. The failure to provide timely notice to these persons may prevent them from obtaining employment, a right they are legally and morally entitled to.

I have spoken recently before employer groups, civil rights agencies, community organizations, and student groups in Michigan, Missouri, Detroit, Texas, and here in Washington. At every location, I have been shocked at the apalling level of misunderstanding about employer sanctions. Many persons still believe that sanctions apply only to Hispanics, or immigrants, or "foreigners." This lack of public misunderstanding threatens to aggravate levels of discrimination; many persons victimized by such discrimination may never be aware they've been discriminated against, may have no avenue for effective redress, and, as a result, may suffer irreparable harm.

IV. RECOMMENDATIONS

The National Council of La Raza believes that time still remains to address many of the problems cited above. With respect to legalization, we urge the Subcommittee to encourage the INS to:

- **Remove the unnecessarily restrictive and burdensome aspects of the proposed regulations;**
- **Negotiate in good faith with potential QDEs to ensure the workability of the Cooperative Agreement;** and
- **Expand the scope of the proposed public information campaign and immediately cease the dissemination of misleading or inaccurate information.**

We also believe it critical that the INS review its own attitudes toward legalization. If the Service continues to approach legalization as a necessary evil, or as subordinate to its enforcement mandate, legalization cannot succeed. The INS must determine, as a matter of its own internal policy, that legalization is in the public interest, and that a successful program requires the maximum participation of the eligible population. Further, this policy must be communicated clearly to all INS staff, unequivocally and without reservation. In the absence of this kind of commitment, we fear that legalization in this country will resemble the largely unsuccessful programs in other countries.

With respect to employer sanctions and discrimination, we wish to incorporate by reference the recommendations in the attached memorandum; we further recommend that:

- The INS insert the above-referenced clause clarifying employer and employee obligations into the final rules and the I-9 Form; and
- The INS make special efforts to discourage discrimination resulting from the Act by including appropriate warnings to all employers in public information materials, and the instructions accompanying the I-9 Form.

With respect to Congressional action, we recommend that:

- This Subcommittee urge the Appropriations Committee to fully fund the legalization provisions of the Act, including:
  - Additional funding for QDEs; and
  - Additional funding for public information.
- This Subcommittee carry out vigorous oversight activities, including:
  - A series of field hearings, to observe first-hand the problems with the implementation of the Act; or
  - At a minimum, witnesses from local communities to provide testimony on the status of implementation in their areas.

Finally, we have received indications that some members and Congressional staff are skeptical of the difficulty applicants are having in legalizing their status. We would therefore invite these skeptics to counsel and assist at least two legalization applicants on a pro bono basis. We believe that "real world" experience will convince even the greatest skeptics of the difficulty in preparing a successful legalization application. We would be happy to coordinate such activity, in conjunction with local community groups.

On behalf of the National Council of La Raza, I wish to repeat our appreciation for the opportunity to testify. As always, we stand ready to assist the Subcommittee in its work.

ENDNOTES

1. *See* Select Commission on Immigration and Refugee Policy, *U.S. Immigration and Refugee Policy and the National Interest: Final Report and Recommendations*, 1981; Senate Report 99-132, 99th Congress, 1st Session; House Report 99-682, Part 1, 99th Congress.

2. Doris Meisner, Demetrious Papademetriou, David North, *Legalization of Undocumented Aliens: Lessons From Other Countries*, 1987.

3. The literature is replete with examples of the "reverse flow" of immigrants prior to the holiday season. *See*, for example, Anne Erlich and Paul Erlich, *The Golden Door*, 1979.

4. "Lure of Amnesty Takes Painful Toll on Families," *Dallas Times Herald*, March 24, 1987 (case of Jesus Bustos); "The Paradox of Amnesty," *Dallas Times Herald*, March 22, 1987 (cases of Abelardo Lazalde, Jose Montoya).

5. Jonathan Lamb, cited in "Amnesty Sending Fearful Aliens for Help, Only Some of It Useful," *New York Times*, January 15, 1987.

6. "The Other Side of the Border," KERA-TV, (PBS Documentary), forthcoming, May 1987.

7. Muzaffar Chishti, attorney with the international Ladies Garment Workers Union, April 4, 1987.

8. *See*, for example, U.S. Catholic Conference (and 25 national organizations), Comments on Preliminary Draft Regulations, February 5, 1987; American Immigration Lawyers Association, Comments on Preliminary Draft Regulations on Legalization, February 5, 1987; Letter of Raul Yzaguirre to Alan Nelson, February 5, 1987; Memorandum of Hogan and Hartson, "Analysis of Eligibility and Waiver Standards of the Immigration Reform and Control Act of 1986," February 17, 1987.

9. Dan Purtell, "The Immigration and Naturalization Service: An Analysis of Its Reforms and Subsequent Effects on Hispanics," National Council of La Raza, June 1986; (undergoing revision) revised version forthcoming, 1987.

10. Letter from U.S. Catholic Conference (and 28 national organizations) to Alan Nelson, March 10, 1987. *See* also, "National and community organizations raise deep concerns....," press release, U.S. Catholic Conference, March 10, 1987.

11. "Preliminary Analysis of Legalization Costs," National Council of La Raza, forthcoming, April 1987.

12. "Officials Expect Increase in Legal Horror Stories," *Dallas Times Herald*, March 25, 1987.

13. "Is INS Destined to Lose Legalization Battle Too?"; *Ibid*; the piece states:

> The INS plans to spend $25 million on advertising campaigns to make illegals believe that amnesty is the chance of a lifetime, [Steve] Martin said. (Martin is Southern Regional Commissioner for INS.)

14. "Alien Dismissals Reported in State," *New York Times*, January 25, 1987; "U.S. Migrant Law Falls Hard on Jobless in Central Mexico," *Washington Post*, March 3, 1987; "Legal Confusion Disrupts Area Salvadorans' Lives," *Washington Post*, March 2, 1987.

15. "INS Says Registration Good For All," *Eastside Sun* (Los Angeles), January 22, 1987 (quoting Joe Flanders, spokesperson for Western Region of INS).

16. Employer requested anonymity; conversation on March 23, 1987.

17. "Legal Confusion...," *op. cit.*

18. Testimony of Raul Yzaguirre, Senate Hearings, Committee on the Judiciary, Subcommittee on Immigration and Refugee Policy, June 17, 1985; Statement of Raul Yzaguirre, House Hearings, Committee on the Judiciary, Subcommittee on Immigration, Refugees and International Law, October 1, 1987.

19. "The Immigration Reform and Control Act of 1986: New York's Response," Inter-Agency Task Force on Immigration Affairs, March 1, 1987.

20. "Rights Groups Fear Resurgence of Bias in Hiring," Dallas Times Herald, March 26, 1987.

21. House Report, op. cit.

22. International Ladies Garment Workers Union (and 26 national organizations), Comments on Preliminary Draft Regulations on Employer Sanctions, February 5, 1987; American Civil Liberties Union, Comments on Preliminary Draft Regulations for the Employer Sanctions Provisions of the Immigration Reform and Control Act of 1986, undated; letter from Raul Yzaguirre to Alan Nelson, op. cit.

23. Letter of Michael Martinez, cited in Congressional Record, May 17, 1983. Martinez, then Deputy General Counsel for EEOC, characterized the Commission's record on behalf of Hispanics as "worse than dismal."

RESPONSES FROM THE
NATIONAL COUNCIL OF LA RAZA

Questions from Senator Kennedy:

1. Your organization will potentially play a major role in the legalization program. I understand a number of your affiliates are considering "qualified designated entity" status with the INS, but suggest that there are major barrier[s] in the way of their participation.

Are there reasonable and feasible steps consistent with the statute which the Immigration and Naturalization Service could take to assure their participation?

Response: Yes. The barriers identified by our affiliates include:

(a) The insufficiency of the $15 reimbursement per completed application in the Cooperative Agreement;

(b) The absence of sufficient "start-up" or "up-front" funding for local service providers;

(c) The insufficiency of the $1 in administrative funding per completed application for national QDEs, which will limit the quantity and quality of training and technical assistance available to local service providers;

(d) The restrictiveness of the proposed regulations, which will greatly complicate the QDEs' activities; and

(e) Widespread skepticism regarding the Service's commitment to the success of the legalization program, and concerns of local groups about being too closely identified with the Service.

All these barriers could be effectively reduced — if not eliminated — if the INS were to:

(a)&(c) Increase the per-application reimbursement to $20 or $25, and allow national QDEs to utilize some proportion of the difference for enhanced training and technical assistance;

(b) Provide some minimal level of "up-front" funding to local service providers, repayable in installments from fees collected from applicants and from reimbursements for completed applications;

(d) Remove the unnecessarily restrictive and burdensome aspects of the regulations consistent with the Memorandum of April 6, 1987, from 13 national organizations, attached to my written testimony of April 10, and the comments on proposed regulations submitted by a coalition of 28 national organizations on April 20, 1987; and

(e) Adopt and disseminate policy statements and field instructions indicating the Service's intent to maximize participation in the legalization program, and emphasizing the "fail safe" character of the legalization program. These policies should, in addition, be incorporated into all public information efforts sponsored by the Service.

Given that the beginning of the legalization application period is but a few days away, many of these steps will have to be taken after May 5; however, timely action now can still increase the future participation of groups that are undecided about QDE status and enhance the effectiveness of organizations that have already received QDE status.

2. What specific recommendations do you have for continuing INS outreach and public education regarding the employer sanctions and legalization provisions of the new immigration law?

Response: With respect to continuing INS outreach and public education, the National Council of La Raza recommends:

(a) To minimize employer confusion and resulting discrimination or unnecessary terminations resulting from employer sanctions:

  (1) That employers' protection against liability for pre-November 6, 1986, hires be emphasized in INS written instructions accompanying I-9 Forms and in all public statements by Service officials regarding employer sanctions;

  (2) Furthermore, that INS determine, consistent with the statute, that only post-June 1, 1987, hires are subject to verification and inform employers of this policy;

  (3) That INS include warnings against discrimination on the basis of national origin or citizenship status on all instructions and public statements;

  (4) That a box or space on the I-9 Form be created noting the acceptability of the attestation by persons eligible for legalization for verification purposes.

(b) To maximize participation in legalization and minimize exploitation; the Service should:

  (1) Emphasize that — except for cases involving fraud in the application itself — no one will be deported as a result of applying for legalization, whether or not their application is successful;

  (2) Emphasize that the confidentiality provisions protect employers and other institutions providing documents against enforcement actions resulting from the legalization application process, except for cases involving fraud;

  (3) As noted above [response 1(e)], adopt and disseminate a clear, unequivocal policy indicating a commitment to maximizing participation of eligible persons in the legalization program;

  (4) Eliminate inaccurate or misleading statements by INS officials that might reduce participation in legalization, including, if necessary, penalties against Service officials who make such statements.

In addition, the National Council recommends that the size of the public information contract be returned to $25 million, consistent with early projections of the amount needed to carry out effective public education efforts.

Question from Senator Simpson:

1. There were many advocacy groups who attempted to scare the undocumented population into thinking that the bill's legalization program was a "mass deportation program in disguise." While I know that your organization never participated in such distortion, I am certain that you have contact with these groups. What have you done to "cool down" some of these more strident groups, so that those aliens who may qualify are not scared off by those who claim to represent them?

Response: The National Council of La Raza is unaware of advocacy groups who have characterized legalization as a "mass deporation program." We would appreciate receiving examples of such characterizations so that we can respond appropriately.

Many groups, including the National Council and virtually every national organization that supported the legalization program, have expressed concern that various aspects of the proposed regulations and certain INS policies and public statements will deter some eligible persons from applying and/or deny legalization to some eligible applicants. Many of these concerns are shared by Rep. Peter Rodino, chief sponsor of the bill in the House, and other Senators and Representatives (see attached letters).

The National Council of La Raza, working in coalition with some two dozen national labor, religious, civil rights, and ethnic organizations, has taken the a number of steps to reduce the fears — both real and imagined — of persons eligible for legalization and to encourage such persons to apply; the coalition has:

(a) Advocated for the inclusion of strict confidentiality provisions in the legalization program;

(b) Advocated for maximum participation of QDEs to serve as a buffer between the Service and the undocumented population;

(c) Commented extensively on the preliminary draft and proposed regulations toward the end of maximizing the participation of eligible persons in the program;

(d) Carried out numerous public education efforts to encourage eligible persons to gather documents, seek competent advice, and take steps to ensure that they remain eligible; and

(e) Brought evidence of inaccurate or misleading statements by INS officials that might deter participation in legalization to the attention of the Service and the Congress.

If the National Council has contact with groups that attempt to "scare off" qualified persons from applying, we will do everything in our power to "cool down" such groups.

Senator **Kennedy**. Very good, thank you.

Dolores Huerta, we are glad to welcome you here today.

STATEMENT BY UNITED FARM WORKERS UNION

Ms. **Huerta**. Chairman of the subcommittee, my name is Dolores Huerta and I am co-founder and first vice president of the United Farm Workers Union. Our national headquarters is in Keene, California.

Today, I really want to see if we can prevent a very terrible tragedy from happening as it relates to farm workers. As you know, over the years, immigration policies have always been used, especially in the area of agriculture, to have an oversupply of workers so the workers cannot unionize.

I think that we are in the position today to prevent this from repeating. We had in recent history—when I say recent, within the last forty years—we had the Brazero program that ran from 1941 until 1954. We are afraid that this period is going to be repeated because of the pronouncements of the top officials in the Immigration and Naturalization Service, the Department of Labor, the Department of Agriculture, and others.

Basically, what people are saying is that the temporary foreign agricultural worker program now known as the H(2)(a) program in the United States will be greatly expanded and taken into every State of the United States.

Currently, there are about 28,000 workers working under the H(2)(a) program. We consider this temporary farm worker program to be an apartheid program. Workers do not have the minimum social labor benefits such as unemployment insurance, social security benefits. Future H(2)(a) workers will not have the right to integrate. We consider this to be a very bad abuse. It is an institutionalized program of slavery which our government should not be involved in.

VIOLATIONS OF H-2 CONTRACTS

The violations of contracts are numerous and I will present a document for the committee so that it can see what has been documented.

Just recently, in November of 1986, there were 1,000 H(2)(a) sugar cane workers who went on strike. These workers were told that if they did not go back to work they would be deported. The leaders were jailed, there were dogs brought in. Those that refused to go back to work, which numbered about 5,000, were deported. Within a week, they had replaced those workers. I mean, this is the United States of America, this is not South Africa. Workers should have a right to strike if they are not satisfied with their labor conditions.

This is not what the Congress intended, that the temporary farm workers be expanded. The Congress created a very simple special legalization program for farm workers. How can we have any faith that the Immigration Service is going to legalize undocumented farm workers if at the same time is promoting to the public and to the growers the expansion of the H(2)(a) program? These are two totally contradictory programs. You cannot have one without the other. We do not have that many jobs in agriculture.

The number of jobs in agriculture has been reduced from 4 million in the sixties to 1.6 million in the eighties. Mechanization has taken large numbers of jobs away from us through planting techniques, et cetera. We have today an over-supply of workers in agriculture. We want to see the farm workers legalized. We want to assist them to become legalized, but we do not want the current citizen farm workers—indigent farm workers that are out there in those fields—to be displaced by H(2)(a) workers.

People do not realize that 40 percent of the farm workers out there are women. We have students out there who depend on farm work as the only money they have to be able to go to school. We have farm workers who are in their forties that will be discriminated against and displaced if we have additional H(2)(a) workers.

LEGALIZATION PROGRAM

I want to tell the Committee about the legalization program that happened after the first Brazero program ended. There was a very simple program, even simpler than what we now have in the current Immigration Reform Act. The previous Brazero program ended. The termination of that program happened in the Kennedy administration, and I think that was the first time in the history of the United States that our government actually did something to help farm workers.

During this legalization program that happened in the early sixties, after the end of the first Brazero program, there were over one-half million farm workers who were legalized in the United States. They did not have to provide documentation. The only evidence that they had to provide to the Immigration Service was a document that proved that they would not become public charges. This was all that they needed.

These workers were absorbed into the American stream and there was not even a whisper made publicly about the immigration of these workers. We think that the current program that we now have, with the regulations that we have, is going to make it very difficult for farm workers to legalize.

PROTECTING FARM WORKERS

During the congressional debates, both on the Senate and the House sides, there were extensive statements by Congressmen and Senators talking about how this Immigration Reform Act was going to end the situation of farmers living in spider holes and in caves. At the time that the bill was passed, there was knowledge that farm workers were living in caves and in orchards and in spider holes. Where is a farm worker going to get a rent receipt for a spider hole or if he lived under a tree? Where is she going to find a check stub to show that they were working when they were working for a labor contractor who paid them only in cash to avoid his legal responsibilities to pay unemployment insurance, social security benefits, et cetera?

It is very onerous to expect that the farm workers are going to be able to provide all types of documentation needed to legalize.

We would like to ask that in the regulations the affidavit procedures be fully utilized and that they be given primary evidence authority. Otherwise many farmers are not going to be legalized.

Right now in the agricultural areas of California, we have employers who are firing their workers en masse. They are trying to get rid of the workers. They are taking away the transportation which they previously provided. In some of the very large employers like Bruce Church down in Yuma, they have taken away the transportation so that the workers now have to drive all the way from Calexico to Yuma. If the workers get there 15 minutes late, whole crews of workers are told they cannot work. The growers are doing this because they are trying to make an artificial labor shortage in order to bring in the H[2][a] workers. I think this is wrong and we think that Congress should stop this and keep it from happening.

RECRUITING LOCAL FARM WORKERS

I also want to mention that in the bill we put in a $10 million appropriation for recruitment of local farm workers. In speaking to the Department of Labor, there is no plan of any sort to recruit local farm workers. Farm workers have been locked out of jobs, they do not know where the jobs are. There is no advertising for the jobs.

We would like to insist that any jobs be advertised in the native language that the people speak, whether it be Spanish, Portuguese, Punjabi, Filipino, or Vietnamese; and that they be advertised so the farm workers will know where the jobs are; and that this $10 million actually be spent to establish some kind of recruitment program for farm workers.

We are also very concerned about the attitude of the Immigration Service officials——

Senator KENNEDY. We will give you one more minute.

Ms. HUERTA. Have I passed?

Senator KENNEDY. We will give you one more minute.

Ms. HUERTA. Okay. I am sorry.

We are concerned about some of the statements that are being made by the Immigration officials who are going to be in charge of the legalization program. They have referred to farm workers as illegal aliens and scum bags. They have referred to them as drug runners. They have made statements saying "we are an enforcement agency; we are not a legalization agency."

We do not have a lot of confidence right now that some of these officials who are going to be doing a legalization program—and they are going to have a tremendous amount of discretion—actually are going to give these farm workers and other undocumented people the legalization status that they deserve.

One other thing that we would like to see is the Agricultural Commission funded. We think that we need to gather the statistics so that we can really see what the picture is as it relates to farm workers.

Thank you.

FUTURE HEARINGS

Senator **Kennedy**. Thank you. Ms. Huerta.

We plan in the weeks ahead to have a joint hearing with the Labor Subcommittee with regards to farm workers and the Department of Labor regulations; so we will go through these issues then. We will have that scheduled early after the Easter recess so that it would be very helpful, I think, to spend a whole hearing really on that issue and we look forward to having an opportunity to get into the details at that time.

Ms. **Huerta**. Senator, one thing I forgot to raise before is we want to see the sugar cane workers have the ability to legalize, as well as the nursery workers and the forestry workers, which are hired by the U.S. government. Is the government going to fine itself when it has undocumented workers in the Forestry Service? You know, there are large numbers of undocumented workers that are out there in that Forestry Service, and I think they should be given the opportunity to also legalize under this law.

Senator **Kennedy**. Well, as I understand it, the Agriculture Department has not yet issued its regulations. We thought that when we got them we would have a chance to develop the issue further.

FAMILY UNITY

Monsignor DiMarzio, the illustrations that you give us with regard to families that might be divided under legalization is obviously a matter of very great concern. You can see a situation where someone might be able to be legalized because they came here within the authorized time period and then maybe their wife came later, they had maybe a couple of children, they being American citizens now, yet she would be subject to deportation and that clearly makes absolutely no sense.

What are you really advocating, a new extended voluntary departure or a paroling of these cases of divided families? I think that ought to be done myself—individually, case by case—but what actually are you specifically recommending?

Monsignor **DiMarzio**. The mechanism that we are suggesting is one that has been used with precedent in the service, and this was used in the *Silva* v. *Levi* case, as I suggested. Basically, it is docket controllor deferred action. It does not go as far as extended voluntary departure, it is not as complicated, it is a simple administrative procedure that can be applied to these cases, again on a case by case basis, but at least the remedy is there, the assurance to the people to come forward is also there, that they will not expose to jeopardy their immediate family members.

Senator **Kennedy**. We look forward to working with you on that issue, because this is unique, the way that whole procedure was developed. Clearly, we should not be in a situation where effective enforcement is going to send parents of children home, out of the country.

INS INSPECTION OF DOCUMENTS

Let me ask you, Mr. Paras, in the proposed regulations employers have three days to comply with INS requests to see documents. Is that reasonable?

Mr. PARAS. My comment on that point, Senator, is directed to—I think the regulation ought to be amended to give advance notification. That was the point that I was seeking to make, the advance notification of a visit to check records, and historically that is how all other government agencies operate.

It may be an innocent ambiguity, but in this one regard I do not think that the past history of the INS is exemplary. This is a new era and I think that with at least the threat or the concern of unannounced visits, it ought to be made clear that that is not one of the rules of the game.

Senator KENNEDY. Mr. Kamasaki, is La Raza thinking of becoming a QDE?

Mr. KAMASAKI. No, sir, we are not, not on a national level, for a range of reasons, primarily because we were concerned that our technical assistance capacity was not sufficient to effectively train a number of the groups. We have arranged for any and all of our affiliates interested in becoming QDEs to bid with very large independent voluntary organizations, and many are doing so. Five are doing so.

Senator KENNEDY. Thank you very much. We might get back with some other questions.

The Senator from Wyoming?

ISSUE OF CONTINUOUS RESIDENCE

Senator SIMPSON. Thank you, Mr. Chairman.

I particularly enjoyed our visit yesterday, Monsignor DiMarzio. That was helpful for me and I think on this issue of brief, casual and innocent departures you are saying some important things. I think perhaps an adjustment could be made here where we get into that one about having to obtain advance permission—which is something that concerns you.

So, I heard what you were saying, and I share that with Commissioner Nelson, and maybe we can look at a cut-off date or see when that could have been better done, or something. Anyway, that was helpful.

Now, you state that the term "continuous residence" should allow single absences of between 90 and 180 days and aggregate absences of 1 to 2 years during the period January 1, 1982 to the date of enactment.

I sure do remember the legislative intent of legalization. It was probably the one thing in the bill—and there were plenty—that was least acceptable to the American people. Legalization only passed the U.S. House of Representatives by 7 votes. I do not think people ought to forget that. It is not popular yet it was something that I insisted and Senator Kennedy insisted be in the bill. But when you are giving a legal status to people who came here knowingly illegally, and who are not refugees but came solely to work or better themselves, and they are then going to crowd in the line in front of people who have been standing in line for a long time—in the legal line—that is not a palatable thing.

Now, we are going to make it work, and the INS is well prepared to do that. But what Congress intended was to legalize people who had set down their roots in the United States, and those who are unlikely to return, no matter what laws we passed.

Now, if an alien spends half the year in his own country, his or her home country, is that not pretty clear that he has his or her firm roots somewhere else and can very likely return to that home country?

Monsignor **DiMarzio**. I think the aggregate period that we are talking about is from the 1982 date to the present, and the fact is that most of the undocumented people are part of the labor market, they are part of a very fluctuating labor market, where they are laid off for periods of time, and they are able to return to their home country and come back to find these same jobs again. I think the remedial character of the law itself must be maintained. We are looking to find a solution to a problem, but it is a labor market problem for all practical purposes. The intent of Congress was to apply sanctions to the labor market. That is the issue and I think we have to see that the aggregate period of time is greater than what is recommended under the regulations, because there are absences and they are firmly resettled for all practical purposes.

Senator **Simpson**. Okay. Anyway, the intent was clear. Another interesting thing throughout the debate was—and no one ever refuted these figures—but interestingly enough, there are those who are eligible for citizenship in the United States from Mexico who have had a green card for years, yet only 15 percent of them have ever gone on to citizenship, even though by the passage of years in permanent resident status they had that opportunity, showing that deep root to their country.

CONCERNS OF THE CHAMBER OF COMMERCE

Well, enough of that. Let me ask Mr. Paras a couple of questions. You list in your testimony a number of, you describe them as, serious and unresolved concerns that the business community has with the bill, and then state that the INS is doing a "fair job with a bad law," in its implementation process.

The Chamber did support the bill passed by the Senate in the previous Congress, and the bill would not in any way have changed any of the specific concerns that you list on pages 5 and 6 of your testimony. Would not the same concerns have arisen under the bill that you endorsed, which you did? That is puzzling me.

Mr. **Paras**. Senator, I think our position now is that we have this legislation. It is true that initially we did not support the legislation. I think we have been working constructively with INS and other agencies to see that its implementation is sound and I think the questions that we have to address are the questions that go to the future and not to the past. Our basic concern, as I stated here this morning, is that meaningfully there is not going to be a statute until June lst. The statute here as it applies to the American work place will be the regulations that are going to be applied by INS. In fact, when I talk about this, I often erroneously slip into saying IRS because these regulations look to me more like a tax code than they do like any labor employment statute I have ever seen.

I understand the need for the detail. If this statute is going to be effective, and now that we have it, I think we all want it to be effective, then there is going to be a need for an educational program—to have people understand it.

This statute will not work and I think you all know that, unless there is voluntary compliance. That is not unique in American legislative history, but it is critical to the operation of this statute.

Let me make one other point in that regard. The people who are going to be most impacted, the person who will run awry perhaps of the sanction provisions are the small employers. That is an additional reason why more time is needed. It seems to me nothing is lost and a great deal is gained by our suggestion that we defer the, if you will, sanctions provision of this statute in terms of effectiveness for 6 months, until December 1st of this year. Let us devote those energies to making certain that people understand what their obligations are and that they are given a reasonable time for establishing procedures for carrying out those obligations.

Senator SIMPSON. When I was Chairman, I was always up wind from the Chairman's cigar and I am going to I think move my roost to the other side in a moment. [Laughter.]

INTENT STANDARD

Mr. Chairman, I do have questions of other witnesses, but maybe you want to go back to some of yours. I would like to ask on this issue of intent, though, because Wade Henderson has brought it up. The Department of Justice proposes to apply the intent standard, and that is really not so bizarre as one would think, because the House Judiciary Committee report, on page 59, says, "These cases all indicate that the term 'pattern and practice' has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts." That is what it says.

Mr. HENDERSON. But is that——

Senator SIMPSON. Wait and I will get the question, but I would like to try to stick close to what the reality is in this game as we get to intent. They say that they are going to apply the intent standard to all discrimination cases brought before the Special Counsel. I agree with you that the sooner we get that person in place, the better. I am pushing for that. But in your mind, Mr. Paras, does the intent standard exclude any actions that an employer might take, any at all, based on employer sanctions, to avoid hiring job applicants who "look or sound foreign"?

Mr. PARAS. No, it does not. As I said at the outset, I have been practicing in the labor and employment field for some thirty years and I think the problem that we have is a misunderstanding of what I believe the Justice Department means and indeed what the law is with regard to intent.

First of all, I totally endorse Justice's interpretation of the legislative history of the statute and the standard that they have set forth. Intent does not mean that you have to have a public confession by some statement of the employer that is discriminatory on its face.

If my recollection is correct in the proposed regulations of Justice, they cite in the section in which they set forth the intent standard, the Supreme Court decision of *McDonnell Douglas*. That is critical. What *McDonnell Douglas* teaches us is that intent is satisfied in the following situation: If a person of minority background makes application for a position for which that person is fully qualified and the position in fact is available and the employer, instead, hires someone else, a non-minority for that job, then intent to discriminate in terms of shifting the burden of proof has been satisfied. It then becomes the employer's burden to demonstrate that he had a non-discriminatory purpose in hiring the non-minority. For example, he may have gotten references from other employers.

SUNSETTING PROVISIONS

Senator SIMPSON. Our Chairman has got a problem with his time, and I do want to ask just one more question or to make a comment and go on to accommodate the Chairman—the way he is accommodating me. But the Frank amendment, we want to remember, sunsets for two reasons, that if it causes significant discrimination or if the new areas of prohibited discrimination cause an "unreasonable burden on employers." Let us not forget the two edges of the sword with regard to that.

On the intentional discrimination, I just want to enter in the record that language in the House proposal because I think the inclusion of the adverse impact standard really does not have anything at all to do with that.

Back to Mr. Kamasaki, where he is talking about the fees and the unfortunate part of that, and I want in the record the conference report language on page 92. This is not some lower-level bureaucrat deciding this, these are called Congressmen:

> It is the understanding of the Congress and the conferees that the fee level should be sufficient to cover the costs of processing applications and should be comparable to those charged for aliens seeking entry into the United States as immigrants.

That is what it says.

Then go to the Senate report:

> The Committee intends that the Federal administrative costs of the legalization program be in large part financed by such fees.

That is what that says.

LEGALIZATION COSTS

And one final question of Ms. Huerta: You criticize the INS for charging $185 per alien, and I would assume that you intend to organize many of these people. I would think that would be so. You have organized them while they have been illegal, and you surely had every right to do so. But how much are annual union dues going to be for a member of this labor organization, and will those dues then be less for your members who have been legal members versus those who have been illegal members?

Ms. HUERTA. I think you are mixing apples with oranges.

Senator SIMPSON. Well, legal versus illegal is not apples and oranges.

Ms. **Huerta**. No. When a worker pays his union dues, he pays those dues because he is getting someone to represent him in negotiations to get medical benefits for him and his family, to get pension benefits for him and his family, he gets seniority rights, he gets job security, to get the right to a credit union, et cetera. This is a totally different program.

The legalization program for farm workers should be very simple. It should be very easy, because of the qualifications that were written into the law. So farm workers should not have to pay the same amount of money that other people are paying.

Senator **Simpson**. How much will these people pay as annual union dues?

Ms. **Huerta**. It depends on where they work, Senator.

Senator **Simpson**. What is an average?

Ms. **Huerta**. Well, our dues are 2 percent. That is what our dues are.

Senator **Simpson**. Two percent of the wages?

Ms. **Huerta**. Yes.

Senator **Simpson**. Probably more than $185 for a lifetime, is it not?

Ms. **Huerta**. It depends on what the work is and how long they work, because farm workers do not work 12 months out of the year.

Senator **Simpson**. Well, I must say that part of——

Ms. **Huerta**. And if they can get their wages from $3.50 to $7 an hour, it is worth it.

H-2 PROGRAM

Senator **Simpson** [continuing]. Part of the frustration for me is to have heard from all of you during the 6-year period—and many of you were never aboard, ever—and now you have got new wine in old bottles, bringing up things that fit now that did not fit then. Peter Rodino started this stuff in 1972 and 1973, and I did not hear a lot of commentary.

The H(2) program was the creation of Howard Berman, for whom I came to have a great deal of respect. The H(2)(a) provisions were the package put together by Congressmen Boucher and Berman, and in the coordination of getting this bill passed they said, "this is it, Al, if you can take this, then we will bend on some others;" only 8 to 15 percent of illegals that ever worked in agriculture. This is the H(2)(a) program and agreed to by the H(2) coalition, and it did not have anything to do with the Bracero program. It is tighter than the Senate's version of H-2. So, it is an interesting venture to hear—bracero allegations—and I just share with you, you are all exceedingly creative and dazzling.

Ms. **Huerta**. Senator, I have been involved in this issue since the sixties. We were instrumental in getting rid of the first Bracero program under the Kennedy administration, so I am not a newcomer to the scene. I have testified repeatedly on this issue on the House side and we have had our representatives meet with you and testify on the Senate side during these several years. So these are not new issues we are bringing up.

What is new is the legalization program for farm workers. That was a new issue that Congressman Berman—and we are very grateful to him—did push for farm workers so that they could get out of their position of exploitation and legally immigrate to the United States where they would be in a position to defend themselves from pesticide poisoning and from bad working conditions. This is what the legalization program for farm workers does. So you cannot have both.

How can you legalize the undocumented workers and at the same time say that you are going to bring in this other temporary farm worker program? The two are in conflict and you cannot have the two programs. You are going to have one or the other.

Senator SIMPSON. Thank you, Mr. Chairman.

WELCOME TO ADMINISTRATION WITNESSES

Senator KENNEDY. Thank you very much. We will submit some other questions to the panel. We want to thank you all very much.

We want to welcome Commissioner Nelson once again to resume the testimony we had to cut short two weeks ago, and Mark Disler as well, from the Justice Department. Perhaps you could give a response to some of the concerns you just heard from the first panel, some of the groups who will be most affected by the INS regulations.

I know you have prepared a response to some of these issues in a letter answering my questions from the last hearing, and we just received that response late last night. I only had a chance to review it this morning. I doubt if any of the witnesses have had a chance to focus on it.

So perhaps you would mention some of the things that you wrote to me that would respond to some of their concerns, for example, on the whole issue of divided families, if you think you have fully addressed those concerns, also whatever you can say with regard to the fees that voluntary agencies can charge, and the shortage of time in terms of business compliance and what you intend to do in public education.

There are some statutory dates that have been established, but there is some degree of flexibility as well. So maybe we could start with the issue of divided families under the legalization program?

A PANEL CONSISTING OF ALAN NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE; AND MARK R. DISLER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. NELSON. Yes, Mr. Chairman. Again, it is a pleasure to be back before you and the Committee. We, of course, testified, as you noted, a few weeks ago and at that time we submitted a formal statement, so we have no additional formal statement. As you know, we did submit the answers to your written questions and we would appreciate those being entered in the record.

Senator KENNEDY. Yes, we will make that a part of the record.

Mr. NELSON. Thank you.

[The questions and answers referred to follow:]

ANSWERS TO SENATOR KENNEDY'S QUESTIONS

Q. Implementation of the legalization program.

As you know, in enacting the legalization provisions of the Immigration Reform and Control Act, Congress made an extraordinary offer of amnesty for undocumented aliens residing here continuously since January 1, 1982. We are concerned that every effort should be made to implement this program in a generous and flexible manner and not place unnecessary barriers so that many of those eligible will be discouraged or prevented from coming forward.

Specifically, what have you done to address these issues:

-- Instructions to the field: It is clear that in some quarters of INS there is a strong institutional resistance to the whole concept of an amnesty program, and there is a fear by many that INS officers who are inclined towards "enforcement" will lead them to say "no" rather than "yes" to legalization applicants. What instructions have you sent to the field -- what guidance have you offered -- to help assure that INS officers will implement the legalization program in a flexible and generous fashion?

A. We agree that every effort should be, and we believe is being made to implement IRCA in a generous and flexible manner. Since enactment of the legislation, the Service has involved numerous employees from field locations in planning conferences and informational meetings. Information has been disseminated in the form of telegrams and memorandums to all field locations explaining the Act and proposed implementation strategies. Draft copies of the Service's Procedures Manual for the Legalization and Special Agricultural Worker Programs have been reviewed by field personnel on three separate occasions. Copies of the Service's proposed regulations have also been distributed to field personnel.

We take strong exception with the allegation that institutional resistance will cause INS officers to deny legalization to those qualified under the law. It is our policy to adjust all persons who qualify for legalization. Not only is this our policy, but it is our duty as immigration officers and as public servants to follow Congressional intent. It is of interest to note that many INS employees who will be actually working in legalization sites have never worked in an enforcement capacity. For example, 2 of the 3 legalization sites in the State of New Jersey will be headed by INS employees with extensive backgrounds in the Service's Examinations programs (e.g., adjustment of status and naturalization).

The intention of the Service to administer the legalization provisions without prejudice is evidenced by the close coordination between the Service and voluntary agencies and other potential Qualified Designated Entities (QDE's). At a weeklong "train the trainers" conference in late March, the representatives of voluntary agencies who will be training QDE staffs and Service Officers who will be training INS legalization staffs received the same instructions which stressed my commitment to the fair and impartial administration of the legalization program as a cooperative effort.

The balance the Immigration Service will strike is hallmarked by a fair and equitable implementation on one hand and the practical need to maintain the integrity of this program by having flexibility to "weed out" through screening those with serious criminal records, those who do not meet the public charge standard, health requirements, or other grounds of exclusion not specifically removed by Congress in the statute. We will follow Congressional intent and faithfully work to attain this critical balance in implementing the law.

Q. -- Documentation: Although adequate steps must be taken to deter the use of fraudulent documents, we believe INS must nonetheless be flexible in what is required of an illegal alien to prove continuous residence --not just original documents should be required, but accurate or "xeroxed" copies, affidavits attesting to the document's authenticity, etc. Also, the INS regulations give priority to employer based data; should not labor union officials also be authorized to provide affidavits confirming employment history and continuous residence? Since many labor unions keep good employment records, should not an affidavit from a union official be given equal weight as an employer's affidavit?

A. Any and all evidence of eligibility submitted by an applicant will be considered. As provided in the proposed rule, other than records maintained by third parties of which copies may routinely be submitted, INS wants original documents "wherever possible." This provision is designed to deter fraud and to implement extensive forensic examination of documents. Greater weight will be given original documents; however, if they are not available, copies can be submitted. Affidavits and similar third party testimonial evidence may also be submitted. However, such testimony is subject to INS verification and optimally should be substantiated by documentary evidence. No undue priority is given employer records. In those parts of 8 CFR 210 in the proposed rule which refer to documentation and evidence of employment, primary evidence is described as:

> ...government employment records or records maintained by agricultural producers, farm labor contractors, collective bargaining organizations and other groups or organizations which maintain records of employment.

Labor unions clearly fall within this category. Similarly, in 8 CFR 245A, although one section is devoted to "past employment records," this term is not meant to be exclusive of union records and the acceptability of "attestations by.. ..unions" is specifically noted.

Q. -- Cooperation of employers: We know from other countries that an employer's cooperation can be extremely important in helping establish an undocumented alien's continuous residence and eligibility to be legalized. However, if employers believe this cooperation will make them liable for not paying taxes or Social Security payments, they will be reluctant to assist. Has INS and the Justice Department raised these concerns with the Internal Revenue Service, and are you prepared to send a clear message that employers will not be harassed or targeted for helping undocumented aliens document their work and physical presence in the United States?

A. INS interprets the IRCA confidentiality provisions to extend to documents and information provided by employers and other parties to applicants to support their applications. If such documents reveal non-compliance with IRS withholding or reporting requirements or similar violations, that information will not be transmitted to the agencies concerned by INS. INS has stated this to the media, to concerned organizations such as the American Farm Bureau Federation, and to other federal agencies, including IRS, FBI, SSS, SSA, etc.

However, INS is also concerned that affected parties not misconstrue its message as the announcement of a tax amnesty or something similar. It is important that violators understand that INS will not use nor provide to any other agency for use against them any information they provide, but that they, nevertheless, remain liable for the penalties for such violations. In stressing confidentiality, INS consistently advises violators to bring themselves into compliance wherever possible.

Q. Fees: The legislative history is quite clear that legalization fees should help pay for the legalization program and be consistent with other immigration-related fees. Although we would have supported a lower fee than that you have proposed, we need not quibble over the exact dollar amount. However, many believe we should take steps to assure that the fee does not become a barrier to those who, for some reason, would find paying the entire fee at the outset a financial hardship. It would seem reasonable to allow for deferred payments in such circumstances. Shouldn't there be some flexibility in administering these fees?

A. We agree with your statement about the legislative history of the criteria for establishing the fee. We strictly believe we have determined this fee consistent with Congressional intent and fairness even though you would have liked a lower fee. We do not believe that the Government can agree to a "deferred" payment plan for aliens or can extend "credit" to legalization applicants. We are very concerned about the practical, legal and administrative difficulities we would encounter with this program. We cannot agree to a deferred payment or "credit" system.

Q. Qualified designated entities: The legalization program is a unique and massive effort in which potentially large numbers of applications must be completed within a time period statutorily limited to one year. Every effort must be made to enable voluntary agencies, labor unions and other community groups which can assist in the completion of applications and which can qualify as "qualified designated entities" to do so. This requires flexibility on the part of INS: (1) in funding levels established through cooperative agreements with qualified designated entities; (2) through the provision of adequate "up-front" monies to enable both national agencies and their affiliates to hire and train staff before the start of the legalization program; and (3) in permitting qualified designated entities to charge fees in a manner and amount which enables them to provide the required services. What will INS be doing to assure that such flexibility is present? Will INS be making every effort to ensure that agencies whose participation in the program as QDEs is needed will not be prevented from pursuing qualified designated entity status due to the restrictions mentioned above?

A. The Service has developed a balanced cooperative agreement which should enable participating qualified designated entities (QDEs) to assist legalization applicants in a risk-free environment while receiving sufficient funds from the government and reasonable nominal fees and donations from their clients to implement their programs.

For providing general information and assistance to the applicants, the national organizations and their affiliates will receive $16 each fee-receipted application accepted for adjudication by the Service; independent QDEs will receive $15 for each fee-receipted application.

The INS considers this a fair amount to pay the QDEs for the services rendered because it approximates the funding the INS would pay its contact representatives if they were performing the informational and assistance tasks.

The Service has, however, made the cooperative agreement more flexible in order that the QDEs receive additional funds to cover their costs and enhance their programs.

Following recent consultations with concerned representatives of national voluntary, labor and other organizations, the Service accepted recommendations from the volags and amended the cooperative agreement so QDEs could obtain more up-front funding and assess extra charges for counseling services.

The Service raised the start-up funding for national coordinators. Start-up funding is available only in federal fiscal year 1987 and will be based on the national coordinators' credible projections of the numbers of qualified applications to be filed with INS during the temporary residence program. Upon INS approval of the projections, national coordinators will be paid seventy-five (.75) cents for each of the total number of projected applications to be filed with INS. The service had previously set fifty (.50) cents per projected application as the start-up funding basis.

The Service clarified the matter of nominal fees/donations assessed by designated entities. The Service has determined that the seventy-five ($75.00) dollar limit imposed on counseling services and twenty-five ($25.00) dollar limit for photography and fingerprinting are reasonable and will be maintained in the cooperative agreement. However, since the INS never intended ancillary services incidental to counseling, such as photocopying, correspondence, postage, telephone calls, etc., to be covered by the $75.00 limit, these expenses ar exempted from the cap. In addition, because of the considerable documentary requirements of applicants seeking temporary residence, exempted also are extensive counseling related to documentation retrieval and waiver preparation. The designated entity may perform ancillary and extensive counseling services, provided nominal fees and/or donations are assessed for these services

The Service believes these recent changes in the cooperative agreement will encourage QDEs, particularly national organizations, to participate actively in the temporary residence program.

It is interesting to note that the current reimbursement structure allows QDEs the opportunity to charge a variety of fees. For example: The basic counseling fee ($75), plus the photography and fingerprinting fee ($25), and ancillary administrative costs ($15), for a total of $115. Consider that if 2 million applicants pay this $115 fee that a net amount of $230 million could be charged. This is a large amount of reimbursement for "voluntary" agencies. I believe that the needs of the qualified designated entities are more than adequately met by this fee structure.

Q. Addressing the "fear factor".

Both employers and potentially "legalizable" persons fear the prospect of new enforcement against them under the new immigration law. Fear and ignorance of the new law have reportedly caused some employers to unnecessarily fire undocumented workers already on their payrolls. Fear of deportation may also inhibit participation in the legalization program. What assurances can you offer employers and legalization applicants regarding enforcement under the new immigration law?

Aren't there a few simple steps employers can take to protect them selves from INS enforcement and employer sanctions?

Do persons filing truthful applications have any reason at all to fear deportation as a result of applying for legalization?

What specifically are you doing to undertake public education about these protections and to correct the confusion among employers and the undocumented community?

A. Such concerns and fears are unfounded. With reference to employers, we will devote our resources and efforts to achieving voluntary compliance with the law. There is almost no evidence to support these allegations of firing.

We are fully cognizant of our responsibilities to educate employers about the law and believe that our educational program will dissipate fears and concerns. Our objectives are of an educational rather that a punitive nature. We envision a balanced approach between education and cooperation, and strict enforcement of penalties for egregious violations. For example, during the first citation period which extends from June 1, 1987, through May 31, 1988, we will not even issue a warning upon discovery of initial violation if the violation is determined to be there-sult of a misunderstanding of the law.

The INS has developed an employer brochure. I have attached a copy of this for your review. We have also circulated copies of the I-9 form for review and comment, as we have with the draft regulations and the other forms. These forms and materials have been reviewed by many persons and organizations, who submitted comments and suggestions. We have care fully considered these, and will continue to do so during the formal comment period.

A proposed special rule provides that those aliens who claim eligibility to temporary resident status and who intent to apply, or have applied for such status need not present documentation of employment authorization until after September 1, 1987.

Q. Aren't there a few simple steps employers can take to protect them selves from INS enforcement and employer sanctions?

A. Yes. An employer who can show that he has in good faith followed the verification requirements has an affirmative defense to any charge that illegal aliens were knowingly hired.

Q. What specifically are you doing to undertake public education about these protections and to correct the confusion among employers and the undocumented community?

A. The Service has actively worked to provide public information on this new law. To date INS officials have participated in over 1,000 public meetings, press conferences and seminars to inform a wide range of employer, labor and community groups of the provisions of the new bill.

We have undertaken an open regulatory process that is unprecedented in it's openess to public comments. In this regard, we provided draft preliminary regulations for public comment early in the process. We currently will receive public comment until April 20th on the regulatory provisions of this bill.

The I-9, Employer Verification Form, and the other forms have been published in the Federal Register and otherwise been made available for public comment. Again, it has been a very open process, whereby we benefit from the public comments we have solicited in this approach.

The Service is implementing an intensive public education program. This program is administered at our Central Office by the new division of Employers and Labor Relations. Education and cooperation with employers and other interested parties constitute the objectives of this program. Personnel responsible for the program will prepare educatiuonal materials concerning the requirements of the law for dissemination to the public.

Assistance will be provided to employers with respect to verification procedures and record retention.

Q. Ensuring clarity in message to employers.

We have read your new pamphlet entitled "Information for Employers About the New Immigration Law." While it is valuable in many respects, it contains two items which appear unnecessary if not gratuitous. For example, in one section it recommends that employers first ask new hires whether they "are U.S. citizens" and, second, otherwise lawfully authorized to work. The immigration bill contains no such citizenship test, only that the person be asked whether he is legally permitted to work in the U.S. Furthermore, the pamphlet suggests that employers may choose to check the status of all persons hired before the bill's enactment on 6 of last year -- confusing advise to employers given the "grandfather" clause of the legislation. Why insert into your publications suggestions which in and of themselves may become the source of employment discrimination or unnecessary firings?

A. Whether or not a person is a United States citizen is of great import in the verification of employment authorization. An employer is required to verify through an examination of documents both employment eligibility and identity. The employee must attest that he is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien with employment authorization. A citizenship test was not envisioned by the framers of the statute; however, the fact of citizenship is integral to the verification process. This is clear in the reports of both the Senate and House of Representatives, as well as the joint conference report, which constitute the legislative history of the Act.

Furthermore, the law specifically provides that employers can "prefer to hire" a United States citizen over an alien authorization to be employed "if the two individuals are equally qualified [section 274B(a)(4)]." The exception to the nondiscrimination provisions of the law does not permit a blanket "citizens only" hiring policy. However, it does allow an employer to hire a United States citizen rather that an alien if the two are equally qualified for the job. It also permits the employer to consider alienage in hiring decisions, as long as the citizen is equally qualified.

Additionally, the nondiscrimination protections of the law do not apply to an alien who claims discrimination on the basis of foreign citizenship and who has not completed a declaration of intention to become a United States citizen.

Q. Work authorization for potentially legalizable aliens.

One unforeseen problem in the new law is that enforcement of employer sanctions begins before most potential legalization applicants will receive work authorization. INS is to be commended for its creative resolution of this problem in the draft regulations in which a statement by a job applicant that he/she is pursuing legalization will suffice asemployment document (in conjunction with Form I-9) until September 1, 1987. Could this not be extended to September 1, 1988, given that people will be trying to complete legalization applications throughout that period and therefore will lack the required employment authorization to be hired?

A. This suggestion would not be desirable and will not be pursued unless absolutely necessary. This date could be extended to September 1, 1988, if INS expected that it would not be able to timely adjudicate request for employment authorization for legalization applicants', after this date, within 30 days of the filing of their applications, if not sooner.

Q. Immigration detention.

The FY 1988 INS budget request continues several years of growth in the detention budget by proposing a 24% increase over last year. In addition, INS is requesting $15 million for the construction of another new detention center. What is the justification for such an expenditure when the number of persons actually detained has declined dramatically and when, detention, statistically, encompasses a diminishing share of overall apprehensions? Given this fact, how can INS justify further increases in detention centers and detention spending? Should not employer sanctions will be deterring illegal entry, and therefore be decreasing, rather than increasing, the need for detention space?

A. Since the enactment of the Immigration Reform and Control Act of 1986, overall Border Patrol apprehensions have decreased by 26.8% from November 1986 to February 1987. However, the Patrol has: increased the apprehension of criminal aliens by 35%; INS increased narcotic interdictions, which in the first quarter of fiscal year 1987 have exceeded the total seizures made four years ago.

The INS also anticipates:

-- the increasing numbers of illegal aliens leaving the U.S. under the sanctions provision of the Reform Act will try to re-enter with fraudulent claims to legalization or Special Agriculture Workers (SAW) status.

-- lacking employment opportunities, increasing numbers of aliens who resort to criminal activity.

-- family and friends of illegal aliens now residing in the U.S., seemingly protected from removal, will attempt to entry the U.S.

-- the flow of Other-than-Mexican (OTM) aliens, already increasing since January 1987, from such countries as El Salvador, Nicaragua and Honduras will continue to grow. The average stay in detention for the OTM's has been determined to be 19.02 days in 1986 compared to the average stay for Mexicans at 3.26 days.

With the increase of Border Patrol resources for enforcement efforts on the immediate border, the new facility will be used to support interior enforcement initiatives, particularly INS' increased efforts to remove criminal aliens from this country.

Q. INS enforcement

In recent years, INS has increasingly become involved in efforts to combat drug smuggling, ethnic crime rings, terrorism, and other matters not within the traditional INS mandate. While these are important enforcement activities, we are concerned that the Service is assuming enforcement functions which the Congress has assigned to the Drug Enforcement Agency, the Federal Bureau of Investigation, and other federal enforcement agencies. While cooperation with these other agencies is appropriate, we are concerned that INS should not be diverted from its central mission.

A. We agree that investigation of aliens committing serious crimes has not previously fallen within the traditional INS investigative activities. However, INS uniquely has both the expertise and investigative jurisdiction to success in such investigations whether other law enforcement agencies often fall short. For example, in addition to drug smuggling or other crimes, our experience is that these same aliens also engage in crimes over which INS has exclusive investigative jurisdiction such as alien smuggling, counterfeit immigration documents, illegal entry and others. In these areas, INS ultimately has the ability to pursue the deportation of the aliens involved. Removal from the United States is oftentimes more effective in stemming the criminal activities of these aliens than is lenient sentencing or incarceration of the same participants. INS is committed to continued investigative emphasis in these areas where aliens are involved in serious narcotics offenses.

INS has been very active in efforts to control the entry of illegal drugs at the border. The narcotic interdiction efforts have included Operation Alliance, a multi-agency coordinated approach, in which INS has paid a major role resulting in dramatically increased narcotic seizures at the border.

It must be recognized that illegal alien smuggling activities and narcotics interdiction are inextricably intertwined. The criminal element that engaged in the smuggling of human beings for profit, also uses "mules", a term for causing illegal aliens to participate in the smuggling of illegal drugs into the country.

We cannot tolerate, either from the perspective of basic humanitarian concern for aliens, or from the perspective of the terrible social costs of these illegal drugs on American society, to allow this criminal activity to go on unchecked. INS has a strong and important role as the primary law enforcement agency between land ports of entry to stem this flow of illegal drugs, as well as fulfilling our primary mission of apprehending persons illegally crossing the border.

Q. Palestinian arrests in California

As you may know, there has been considerable controversy surrounding the arrest by INS officers of seven Palestinians and a Kenyan in California under Sec. 241(a)(6). Upon request of my staff, I received on March 3 a letter from Assistant Attorney General John Bolton that states that the arrests were the result of a two-year FBI-INS investigation. Mr. Bolton argues, "Considering the length and seriousness of the investigation and what knowledge the Department has at this time, the charges against the seven Palestinians warrant their custody."

If the evidence against the Palestinians is as serious as Mr. Bolton suggests, why did INS, rather than the FBI, conduct the arrests? And why were arrests made on the broad basis of Sec. 241(a)(6)(D)? Is there an ongoing investigation in this matter?

A. The INS, having investigative jurisdiction for Immigration related offenses, engaged in a joint investigation with the FBI because the individuals involved in this case are aliens in the United States, suspected of committing unlawful acts for which they could be deportable. It is not unusual for several agencies having overlapping jurisdiction to work collectively using a variety of statutes, to bring cases to successful conclusion. In this case specifically, all aliens have, at this time been charged with violations of the Immigration and Nationality Act. Their immigration hearings are pending.

In his editorial column of February 10, 1987, in the New York Times, Mr. Anthony Lewis discusses the case of Evelyn Bitar, who was allegedly taken into federal custody simply because of her "Palestinian origins" and allegedly subjected to serious mistreatment. To determine the facts, the INS Office of Professional Responsibility (OPR), the independent office that examines serious allegations of official misconduct, is investigating and will report its findings. In your deliberations to determine whether to place credence in Mr. Lewis' account, consider the following: 1) to date all efforts by OPR to contact Evelyn Bitar have been totally rejected by her and her attorney, Dan Stormer; 2) there were no INS or FBI agents working on the case in question the evening this woman's alleged abduction occurred; 3) neither the INS nor the FBI employs a person of the description who supposedly participated in the abduction in the Los Angeles or San Diego area; 4) the alleged methods of interrogation, handcuffing a person to a metal post, interrogation in private residence, attempting to bribe, etc., are so far outside the bounds of permissible investigative behavior as to be incredible.

These facts raise an important question: whether this incident actually took place, or whether it was merely an attempt to gain publicity to influence a pending court case? The investigation into the allegations will, of course, continue. If there is any truth to them, you can be assured that appropriate corrective action will be taken.

Q. Asylum standards

The Supreme Court has properly rejected the Attorney General's usage of the "clear probability" standard in determining eligibility for asylum under the Refugee Act of 1980 (INS v. Cardoza-Fonseca). What are INS plans -- and those of the Department of Justice -- for reinstructing district directors, immigration judges, INS trial attorneys and other relevant persons within the adjudication process regarding the need now to apply a "well-formed fear" rather than a "clear probability" standard? What actions have been taken in response to the Supreme Court's decision?

A. Attached is the instruction to Service district directors relative to applying a standard of evidence in the adjudication of asylum requests consistent with the holding of the Supreme Court in INS v. Cardoza-Fonseca (No. 85-782, March 9, 1987).

As you know, the Supreme Court did not specify a standard of evidence, rather noting that it was distinct from and lesser than the "clear probability" standard which the government had been following. The Court indicated that the proper standard should be developed in the process of case-by-case adjudication. We are meeting with the Executive Offices of Immigration Review, the Office of Immigration Litigation and others within the Department of Justice to develop the appropriate field guidance.

The standard for asylum cases is still what Congress determined in the Refugee Act of 1980. This "well founded fear of prosecution" standard is still the primary determinant and still places the primary burden on the applicant. It is common experience that many asylum claims are frivolous or without any evidence. Therefore, it is unlikely that this new standard will change the outcome on future asylum cases.

Finally, a training program for designated asylum examiners of the Service is scheduled for May. At that time, we will be providing further guidance to Service officers.

Memorandum

CO 208-P

Subject: Supreme Court Decision in INS v. Cardoza-Fonseca

Date: MAR 2 4 1987

To: All Regional Commissioners
All District Directors
All Officers-in-Charge

From: Examinations

Attached is the recent decision of the Supreme Court in INS v. Cardoza-Fonseca (No. 85-782, March 9, 1987). The government sought certiorari in this case to secure clarification of the standard of proof to be applied in adjudicating asylum requests.

The Court held that Congress intended a different standard for asylum determinations from that for withholding of deportation relief under section 243(h). The Court stated that the standard should be more lenient than the clear probability or "more likely than not" standard which the Court determined was the standard of proof to be followed in 243(h) decisions, INS v. Stevic, 467 U.S. 407 (1984). However, the Court did not specify what the standard was to be in asylum cases. Instead the Court held that the standard should be established through a process of case-by-case adjudication.

The closest the Court came to suggesting the proper standard was in quoting from its previous Stevic decision:

> As we pointed out in Stevic, a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility." (p.18)

The Service will be meeting with Department of Justice officials to discuss the appropriate standard and more precise field guidance to district directors making asylum decisions. Precedent decisions of the Board of Immigration Appeals can be expected to provide future guidance, and revisions to the current asylum regulations (8 CFR 208) will include a provision on the standard of proof. For the present, you should read the decision and apply the Court's holding that the standard is less than clear probability.

The Supreme Court held that asylum remains a discretionary decision of the Attorney General and his delegates. However, it would not be appropriate to utilize discretionary denials to effectively reinstitute the higher standards rejected by the court, arguing that the Court had limited its opinion to the burden of proof standard. Discretionary denials of asylum to aliens who meet the "refugee" definition should only occur in cases where significant adverse factors outweigh any favorable factors in the case, and such adverse factors are clearly supported in the written decisions.

Richard E. Norton
Associate Commissioner

Mr. **Nelson**. If I might comment along the lines, I did have the opportunity to hear most of the prior witnesses and I might preliminarily say that, while we do not always agree with representatives that are here or others, I think we have had a good on-going dialogue and effective relationship, certainly our differences have been on the issues.

I do appreciate a number of the favorable comments that they made. I realize that they do not want to make too many, it might be a danger to their reputations. We do appreciate and they are committed to working effectively with all the youth.

ISSUE OF FAMILY UNITY

Mr. Chairman, a couple of the comments and questions you raised I think were brought up in Monsignor DiMarzio's testimony, so I will just touch on those, regarding the family unity issue and the fees, and then touch on a few of the others and respond as we go along.

I think on the family unity thing, this of course is a very interesting and difficult issue. I think again, as I believe Senator Simpson just reflected in some of his questions, you basically have to look at the legislative intent. Congress dealt with the issue. Congress did not provide that people could stay or qualify if they did not meet the standards and that is probably no different than somebody who came into the country on January 2, 1982, they would not qualify although a day earlier they might have. It is difficult on time.

Now, there are provisions whereby the Attorney General can exercise humanitarian procedures. We will do that, but I think it is quite obvious that this cannot be turned into a blanket permission to allow people to stay——

Senator **Kennedy**. I do not think they were talking about that. I think they were talking about the treatment of individual cases, they are talking about individual families being divided.

Mr. **Nelson**. Well, there will be a case by case basis, but the law is——

Senator **Kennedy**. What is the general policy, are you going to send the wife or husband back?

Mr. **Nelson**. If they do not qualify, we have no choice under the law. The idea of the *Silva* v. *Levi* approach that Monsignor DiMarzio said, I do not think is really applicable here. As a matter of congressional intent, as Senator Simpson indicated, legalization was a very close call in the House, the Congress chose not to deal with that. We will be as reasonable as we can, but I might also state, Mr. Chairman, that I think again it is very important, as we look at this whole program in the legislation, is giving the illegal aliens a tremendous generous benefit to stay in this country, but they must qualify.

Senator **Kennedy**. The nature of——

Mr. **Nelson**. And they should not be better off than a legal alien. A legal alien coming in might have to wait years to petition for relatives, and that is really where we are with the spouses who might be separated, so I think it is important to keep that in mind. We will do what we can. We think it is a matter frankly Congress will have to look at and make a legislative change should that be the desired approach.

Senator **Kennedy**. Well, I just would point out, without debating the whole issue over again, that the agricultural industry in this country could not survive without people coming in here. We want to treat them decently and the track record is they have not been treated decently, and I was around here during the "Bracero" program and it was shameful—shameful the conditions they were living in.

So when the people come up here and talk about the insensitivity of INS, there is a very solid basis for it, Mr. Nelson, maybe not during your watch, but during past watches. So we are trying to find out evidently—and this is very interesting—about an administration that talks about family values, that if you have someone that might be here and qualify for amnesty and might be a parent of small children, that you are going to say that under the law there is no way to deal with this and therefore you are going to follow the law, and that means deportation——

Mr. **Nelson**. Well, Senator, I——

Senator **Kennedy** [continuing]. If I can finish—even though there are other provisions in the existing law that talks about extended voluntary departure and other discretionary authorities?

Now, that is what I am trying to find out, is how are you going to deal with it, and I just want you—you put it on the record, because you put it there and I just want to find out whether it is going to be your recommendation to the Justice Department to say that this is a special concern to the administration in terms of divided families or not or it is another provision in 30 pages of legislation, Senator. Which is it?

USING DISCRETIONARY PROVISIONS OF LAW

Mr. **Nelson**. Mr. Chairman, you just mentioned one statement in your thought right now and that is follow the law and that is what we are here for. Our regulations must follow the statute that Congress chose not to blanket in people who did not qualify. They set qualification standards. For us to do differently would be not to follow the law and that would be inappropriate by anybody's standards.

Now, we will do what we can. We will look at individual cases. We certainly do not desire to separate the small children. For example, if you have a husband and wife, and one qualifies and the other does not. I do not think there is any question under the law that the person who does not qualify is not eligible to stay absent some extreme humanitarian consideration, because if you allow everybody to stay, what you are doing is expanding the meaning of the statute which would not be appropriate.

Again, let me say that I do not think it is appropriate for anybody to say there is a lack of humanity in here. I think we have that and it is demonstrated every day. The point is that if we have the situation we will deal with it, but I think we have to follow the law, and again I think it is important to reflect that we have to treat illegal aliens certainly no better than legal aliens, and that goes into the fee issue that we have discussed formerly, too.

Senator KENNEDY. Well, the law, Mr. Nelson, provides for paroling and it also provides for extended voluntary departure. So the law provides for humanitarian considerations and the law has been humanely enforced, with discretion, at different times.

Mr. NELSON. I would suggest, Mr. Chairman, that if the Congress feels that any spouse or somebody who qualifies, that it would be very simple for the United States Congress to address that issue and pass a specific amendment which could be two lines saying a spouse of a qualified legalized alien should qualify, then it would be very simple. Absent that, we will deal humanitarianly with cases, but you cannot use as an humanitarian exception, if you will, to blanket in every spouse. That would be a misinterpretation of the law and it would be exactly against the intention of the Congress.

Senator KENNEDY. That is not what the record will say. No one is talking about a "blanket" policy; I never mentioned that. If you want to use those words, you go ahead and use them. That is not what the question was.

INS FUNDING OF VOLUNTARY AGENCIES

Do you have sufficient funding in the pipeline now so that you can open the doors and make the legalization program work?

Mr. NELSON. I believe so, and I would ask you and all members of Congress who had a similar hearing in the House yesterday, the answer is we are ready to open on May 5th as scheduled and we feel proud of the efforts that have gone in for a mass of tests, but come June 1 the loan becomes due because we have been borrowing with OMB approval against our fourth quarter monies in order to start implementation. We are dependent on the passage of the 1987 supplemental to get the funds back in the pipeline or we would face serious closures throughout the system.

DOCUMENTATION REQUIREMENTS

Senator KENNEDY. What can you tell us about the documentation requirements for legalization? You made some statements in your letter to me, which we will make a part of the record, but I would like you to talk about that a little bit more. We wrote you that "we believe INS must nonetheless be flexible in what is required of an illegal alien to provide continuous residence, not just original documentation required but accurate Xerox copies."

Mr. NELSON. Mr. Chairman, I think on the documentation, this has been a good example again of how this process of the regulation writing has worked and worked effectively with the many comments we had even before the preliminary draft and then the preliminary draft in January, and as I say, two feet of comments from that. We are in the process now, after publication in March, of reviewing and we will be getting more in the next ten days of comments on the documentation in one area.

I think we have been very effective and reasonable. It does not satisfy everybody, but we spell out in the regulations a wide variety of documents that can be used to establish somebody's eligibility. Obviously, employment records are key, they are the most important because they not only are subject to corroboration, they also deal with the public charge issue, but we spell out utility receipts, rent receipts, school records, medical records, a tremendous variety, including use of affidavits. There is we think a tremendous area and ability for people to prove their case. The law, of course, is very clear that the burden is on the alien to prove their case.

IMMIGRATION DISCRIMINATION

Senator KENNEDY. We will have some more questions for the record; and want to move to the definition of immigration discrimination and I guess Mr. Disler is the one to ask this question.

We were talking about the test and, as you imagine, we get some division on this issue on our subcommittee, but it seems to me really quite clear. In the statute itself, as well as the legislative history, the provision dealing with unfair immigration discrimination related to employment practices in the particular section—I have it here before me, I do not know whether you have it, Mr. Disler, there is only one reference to "knowing and intentional discrimination" and that is private actions. If the Congress intended that you were going to have knowing and intentional elsewhere it seems to me it would have been in the other provisions. Obviously, when you are defining pattern or practice, it has to be an intention, but with regards to the other provisions it was quite clearly not included. Nonetheless you have it in the regs. Why?

Mr. DISLER. Mr. Chairman, could I come back to that in a moment and make a couple of quick brief remarks in light of some of the testimony?

Senator SIMPSON. Would you pull that microphone closer, please?

Mr. DISLER. Sure. Might I make a couple of quick introductory remarks and then return to that?

Senator KENNEDY. Fine.

Mr. DISLER. I appreciate that. I do welcome the chance to come back and answer your questions, including that one.

Senator KENNEDY. Maybe you could just answer that one now and then we will come back to your general remarks, if you would.

Mr. DISLER. That is fine. I would like to enter in the record the preamble's discussion of the bases for our intent standard, if I could.

Senator KENNEDY. Yes, it will be made a part of the record.

DEPARTMENT OF JUSTICE'S INTERPRETATION OF ACT

Mr. DISLER. Thank you. The basis for the standard is derived from the operative language of 275(b)(a)(1). As we set forth in the preamble, as we testified earlier, our view is that it is well grounded in the statutory language and legislative history. The Congress used "because of" language which is analogous to the piece of Title VII from which the intent standard is principally derived. Congress specifically did not amend title VII, and it did not use the part of title VII from which the effect standard has been generally derived.

The underlying purpose of the anti-discrimination provision is quite clear throughout the legislative history. The Congress was concerned that an employer seeking to avoid sanctions, notwithstanding the easy way of avoiding that problem through the verification process, would try to take a shortcut and the shortcut would be simply refusing to hire or to fire people who looked or sounded foreign. That is necessarily an intentional act, that necessarily reflects intentional discrimination. The very problem that Congress was addressing here was classic, intentional kinds of discrimination.

Now, when we turn to the language you cited, Mr. Chairman, in establishing the private right of action, it seems to me a couple of things, and I was most struck by your definition of pattern or practice because it contradicts the view of the chief author of this provision in the House.

We take the view that what Congress is doing there is making clear that an individual act of discrimination or repeated acts of discrimination, intent in both cases, can be brought by the private party but it does not suggest an effect standard. And I do wish to draw attention to something I find most striking: Congressman Frank insisted to me, with the support of his colleagues in December at an oversight hearing, that pattern or practice meant effect. He insisted on that. He repeated it and we had an exchange over that at great length.

Now you are telling me that pattern or practice means intent after all, and it seems to me that the proponents of the effect standard are reaching for whatever argument is available at the particular time to try to, perhaps through post-enactment legislative history, to get something in the statute that was not achieved when it was passed, and I have seen nothing yet to contradict our analysis.

CONGRESSIONAL INTENT

Senator **Kennedy**. Well, if you look at the House report, it is only intentional in the sense that refers to intentional policies or actions by an employer consistent with the Civil Rights Act. It is not intentional in terms of bigotry or clear intent to discriminate. In other words, the reference to intentional policy is not sporadic acts and not intentional discriminatory outcome.

Mr. **Disler**. Precisely, the pattern or practice in our view reflects the legislative history of the——

Senator **Kennedy**. Well, why do you put it in the regulations then when it is not in the statute?

Mr. **Disler**. Well, we believe it is in the statute in the sense that with the analysis I just went through, we believe that the language of the statute and, to the extent we need to resort to it, the legislative history reflects an intent standard of discrimination.

Senator **Kennedy**. It is difficult to understand when those specific words are included only in one of the provisions dealing with private action, then you extend them to the whole issue of discriminatory employment practices.

Mr. **Disler**. Actually, really what we are deriving it from is the operative provision in 274(B)(a)(1). I mean, we believe the "because of" language has generally been regarded as the basis for the intent standard, and that is what you used, and in light of the underlying problem that Congress was attempting to get at, it was not talking about headwinds and these kinds of things, it was talking about the case of an employer seeking to avoid sanctions by refusing to hire people who looked or sounded foreign. That is necessarily an intentional act of discrimination.

I would further point out that the Congress carefully excluded discrimination, for example, in promotions, and that too is perfectly consistent with the analysis that we have undertaken, because if an employer wishes to seek to avoid sanctions he would do it precisely the way Congress feared, by refusing to hire or to fire the person. He certainly would not deny him a promotion, because the person would remain on the payroll and continue to expose him to the sanctions. So we find that really every piece of this is fully consistent with the intent standard as we did describe it. I appreciate the remarks of one of the witnesses this morning because we think the standard may have been misunderstood, frankly. It is a standard that is used in many courts, at all levels of government, and intent is able to be found and is found routinely. That is both good and bad, it is bad that it exists but it is good that it is found.

Senator KENNEDY. We know what we are talking about, because whether it is an effects test or an intent test, we know the position of the administration and I think you have given it and have tried to put a good argument on a poor case, because the statute itself is very specific on this.

Mr. DISLER. Well, I——

Senator KENNEDY. Let me just—I would like to—well, go ahead.

Mr. DISLER. Well, I would just suggest the reverse of that. I think that indeed the proponents of this standard are contradicting themselves in this Congress in its post-enactment oversight process, because Congressman Frank insists pattern or practice meant effect. That was his basis for his argument and now you tell me he——

Senator KENNEDY. No, I am not differing with that particular provision.

Mr. DISLER. Well, I think the record will——

Senator KENNEDY. Maybe I misspoke when I was making the other point.

Mr. DISLER. Well, in that case I would resort to the legislative history of the Judiciary report, which makes quite clear that pattern or practice does mean intent.

Senator KENNEDY. Well, we will send a legal note on to you on that, and make that part of the record.[1]

INS AND VOLUNTARY AGENCY MEETING

Mr. Nelson, I want to thank you for sending the response to our questions and we have made that a part of the record. I would like to see if there may be some opportunity for Monsignor DiMarzio—and we have heard from a number of other voluntary agencies who are concerned about these issues of family unity—and I would like to see if they can come down and visit with you?

Mr. NELSON. Absolutely, Mr. Chairman. Monsignor DiMarzio and I thank all the people at the table and others we, have met regularly. We have recently met on many occasions and we will continue to do so and that is one thing I think even our critics have acknowledged our open policy now and has been and will continue, so I welcome it.

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[1] See appendix.

Senator KENNEDY. Thank you very much.

I apologize to the panel, but I am going to have to necessarily absent myself, but I want to thank you all very much for coming up here and I look forward to continuing to work with you. Senator Simpson has a few more questions and will recess the hearing. We will be scheduling a further hearing in a few weeks.

Thank you very much.

IMPLEMENTATION OF THE BILL

Senator SIMPSON. Thank you, Mr. Chairman. I will just go forward and ask some of these questions and then close it down. Thank you very much for your courtesies to me.

Mr. Nelson, I want to again compliment you for the very thorough, sincere and energetic way you have approached the implementation of the legislation. I think this method of yours of providing several opportunities for comment on the regulations was wholly creative and innovative and effective. Some may disagree, you bet, with the final regulations, but all of us had an opportunity to become familiar with them, and with the service's intention in preparing the rules. They were submitted to the voluntary agencies and to the potential persons who would be running centers and to the public at large, to employers and editorial writers and union groups. And while these regulations are extremely important and a necessary step in carrying out this complicated, you bet, as this gentleman testified, complex and sweeping and difficult new law, I think something else will be proved to be more important to its successes or failures: the effort and attitude of the INS. It really is going to come down to that.

I have come to know personally many men and women in that service, not just those in the central office but others whom I have met during visits around this country and along the borders and various cities abroad, and I have found them to be some extraordinarily good people doing an impossible job—absolutely impossible, especially in the United States, where the law until November 6th was, "it is legal to hire an illegal alien, but it is illegal for the illegal to work," and I do not know how anybody can function and enforce a law like that. People often say, "why do we not go back and enforce the other law?" I said, "that was the other law, it is called the Texas proviso; it could not work and never did"—and INS enforced that without adequate funding, but nearly always, at least in my experience trying to do the best job that it seemed able to do when it had so much conflict.

I think many of the nay sayers will be surprised at the professionalism of this agency when the chips are down, and the chips are down right now, and when they are given the wherewithal and resources to do the job. So I think it is so important we realize the objectives of what we were trying to do. The objectives never changed throughout.

It is very disappointing for me to hear, I believe it was Wade Henderson saying something about this being a blatant attempt, that the regulations were an attempt to—here it is, I always scribble these gems down—the "regs are a blatant attempt to rewrite the law." Boy, we have a name for that in Wyoming, I will tell you that, and that is really a statement I am not going to comment further on.

I remember Wade throughout, he never liked anything we were doing, so I do not know why he suddenly would feel differently. He is a spirited man and a man of great passion for his causes, but so am I. [Laughter.]

Now these objectives, it is almost solely in your hands now, and this is one of the things I was visiting with you people and Monsignor DiMarzio and Tom Donohue and some others yesterday, it is so important now because the search light falls on you, almost solely. But indeed you have the ability to go to Barney Frank and Ted Kennedy and Al Simpson and Ham Fish and Rom Mazzoli and Peter Rodino and Howard Metzenbaum—you know what legislative intent is in this bill, there is no question about that.

So if I could just swiftly say everybody talks about the clear congressional intent so that you can get the job done. Let me take about a 1-minute crack at what that is.

We intend that employers who knowingly continue to hire unauthorized workers are going to be penalized. The employers are not the enforcers of the immigration laws of the United States. The INS is. Now, this legislation should not become an unreasonable burden on American businessmen: That is a part of the study.

Legalization is not a broad amnesty. It is a limited legalization for those who have been here for a certain number of years. However, I think Congress certainly did intend that all of those who have been here since January 1, 1982 be given a fair opportunity to qualify, and we intended that the INS should help those people—that is not what it has done in the past—but they help those people and assist those people to qualify, and not try to make it tough for them, or try to disqualify people.

I think it is very important, when you look at where we have been on this over the years, that we had 2 million people apprehended in the United States, 2 million in 1 year, and we only formally deported 24,000. We deported one out of 800 people. So we are not a Nation of deporters. We do not do that. We are compassionate and we will not start now, I do not think, and under this atmosphere once we pick up that U.S. citizen child and the woman who does not qualify and the man that does, it will fill every column inch of every paper in that area, and I assume that will be indeed common and should be. I have no problem with that. But we do not deport, we are not—not when you are doing 24,000 people out of 2 million—even though many go back voluntarily, indeed they do.

But I think that helping an eligible person to qualify does not mean permitting a fraudulent application to succeed, either, and congressional intent is I think very clear, never on this issue: intentional manufacture or alteration and use of fraudulent documents is not to be permitted, and the law provides stiff penalties—hard penalties, felony penalties—for those who do commit such fraud.

So you are here to help and it is not like the IRS cartoon. We are counting on you and your good faith and that sense of duty, as I know you have and your people have seen to see that this is done fairly and generously and without frightening people, and we will all be observing that closely.

Well, let me just comment quickly. Jerry and Dick, just sit back and I will take 5 more minutes here.

PUBLIC EDUCATION PROGRAM

The public education program has taken longer than I expected and I think you expected to get under way. There is some confusion about how employers should comply with the law, and the Chamber has recommended we extend the public education period for another 6 months, until December lst of 1987. I do not think amending the law is appropriate at this time at all. That is what our oversight over the next months will give us, but I would like your plan, just swiftly, for enforcement of the new law before information and the I-9 forms are readily available, if you would.

CHALLENGES FACING INS

Mr. Nelson. Mr. Chairman, thank you first of all for your summary at the beginning. I think it was an excellent summary both in terms of content and in terms of the recognition of the process. If I might, just before answering your question, just comment on the one major theme I think you had and that is our job is to help people.

I think, if I might just take a personal moment, prior to being—I have been Commissioner now for about 5½ years, and prior to that I headed the agency in California working with the handicapped. I have worked in other major agencies of the State government of California and county government and was with the largest corporation in California and also in the public service arena.

I can say without qualification that the people of INS, obviously in any employment arrangement you have got some dead wood from bad people to super stars, but I can say without qualification that of the 11,000 or more employees we have, I have never seen a harder working group, a more dedicated group and a fairer group, and I think sometimes both members of Congress and others, the interest groups are exacerbated, love to go on the horror story.

Now, we have several roles and one of them is the enforcement role. Our job is to keep out illegal aliens and to apprehend and deport those that are in this country. That is part of our statutory responsibility and I think we do it well and fairly. Again, our Border Patrol is the only agency in the Federal Government that requires Spanish as a job requirement, and when you think of the millions that we deal with and the effectiveness I think on that.

But let us turn beyond that. Our other major role which often does get ignored is the service role. We deal every day with, hundreds of thousands of illegal aliens. Every year we process several million in terms of adjudicating benefits so they can come in and stay in this country, and we are assisting then, and yet we say no sometimes because if you do not say no sometimes then the law is not carried out, and I do not think anybody argues with the need for that. I think we do it fairly.

We are now naturalizing a quarter of a million people a year. That is the end result to get people that have come in as aliens to move down the track to citizenship, more than we have done I think in history. Our backlogs are reduced, our lines are reduced, the courtesy and services are greatly enhanced. Now, that does not mean that there are no problems, but when you admit to this country each year through our ports of entry 320 million people, one and a quarter times our population, there are about to be a few bad situations, but the great bulk we are doing very well, and on and on.

So I think we do and we will continue to be in the service role. Now, we have a new service role with respect to illegal aliens who now can become legalized. Some people say, well, INS has a bad reputation or people are afraid of the INS, and I always ask a follow-up question, well, who are you talking about when you say that. Almost invariably it boils down to, well, we are talking about illegal aliens.

Well, if an illegal alien is not afraid of INS, we are not doing our job because they have had no right to be in the country and it is proper that they be afraid. Now, some of those, and we have a significant number, will qualify and we are committed and the statute directs us, as we have committed in our regulations and our statements, to do everything we can to get every eligible person for legalization to qualify, and that legalization solved, I will put it both together, and we are committed to that and we mean it when we say it and you can even watch us. I hope you do. It is important.

VOLUNTARY AGENCIES ROLE

I hope you also watch the QDEs and the other agencies involved, because they have got a major role in this officially and unofficially to see how the process works. We know we will do a good job and we will do a fair job. On the 5th of May we will open up over 100 offices, and that is as many offices as we have right now, for the separate purpose of dealing with these people to be legalized. Now, that is a major step, a major responsibility and a major accommodation to this special group to have this kind of setup and all of the other things that go with it.

So I think that the record ought to reflect—and while I am on that, maybe to get off my speech soapbox, but I think it is worthwhile because some references to QDEs have been made, and if I could read into the record a few things I think would be helpful.

The Immigration Service is currently reviewing approximately 300 applications for potential qualified designated entities seeking to enter into cooperative agreements with the government. We will complete our review by April 17th, that is a week from today, and we are already starting to approve those and most of the approvals will be forthcoming and we expect a high number of those to be approved within the next week or two. That 300 roughly represent about 700 sites throughout the country, so that is going forward.

Now, about 75 percent of this group are community based and ethnic organizations, and the remainder are voluntary community and religious groups and so forth, and two-thirds of those applications come from the large areas where you would expect. The specific numbers are as follows—I said a specific number: Of 284 applications received, 5 from national coordinators, 225 from community based organizations, 4 from associations of agricultural employers, and 25 from individuals. So the process is working and we encourage the QDEs and the others who have not applied to go through the process. We have plenty of people out there to assist the people and if there are further questions on fees or others, I will get into that.

PUBLIC EDUCATION CAMPAIGN

Let me now turn to your specific question, Senator, as to the public education campaign. I agree with almost everything you have said and so forth, with one slight exception. You say it is delayed beyond what we wanted.

I partially agree with that and I partially disagree, because there is a certain feeling that because it was just the day before yesterday that we announced a massive nationwide campaign and a contractor to carry it out, that somehow this is the beginning of the public relations campaign.

To the contrary, that is strictly a continuation of what has been going on since November 6, 1986. Since that time, up to the day, we have had over 1,000 meetings by INS throughout the United States with people all over, of all natures, employers, labor unions, community groups, representatives here or their people have been here, over 1,000. In addition, we have had over 200 press, TV and radio interviews. Obviously, if we could stack up the copy from the newspapers, it would be many, many inches thick. You would have to add the regulation process to that. Obviously, that is part of the educational and public affairs campaign, and the forms that go along with it.

So that has been on-going and we have continued it. I think, sure, you can always do more. We would just as soon have issued this public contract a few weeks earlier. I hope to publish the final regulations, the proposed final regulations the first of March. We did it about the 18th. That is two weeks late. When you consider all the steps we went through, it is maybe a couple weeks off our own target and it is amazing. Similarly with the public information, it was a big contract and we would have liked doing it 2 weeks earlier but, hey, we have been working with them, they will be accelerating, and as we go forward I think where we have done an excellent job, I think you and others will be very pleased with the job that we will put forward on the national campaign.

Also, a thing we have already done in the southern part of the country, our public affairs people have put out some excellent tapes in both English and Spanish, video tapes. They sent them to some 1,400 stations. Those are running. So the process is on-going and I think just one last point, and I would like your response, I like some of Mr. Paras' points, I think that again this process has gone on, we worked closely with the U.S. Chamber of Commerce, and their earlier brochure, "The Braceros" was excellent and was widely disseminated. We have been on their TV network. We are continuing to work with the U.S. Chamber, the AFL-CIO, and all the business groups we can.

In the next few days we will be sending out half a million copies of this employer information brochure that I believe we have submitted to the committee earlier, and we are anticipating roughly early May of sending out as many as 7 million packages which will be the formal instruction booklet, including the I[9] forms, the employer verification forms, so they will be out to the employers in the United States hopefully by the middle or the latest late May. They will have them before them.

One other thing on the question of delaying it. I can appreciate the concern, but again in a law as big and complex as this, with all the work that has gone on, I think there has been a lot of information out there. The forms will be out and, again, the way we will enforce it, we are committed to enforcing it reasonably. We will be talking to employers.

As you know, we established the Employer Labor Relations Assistant Commissioner position, with 70 positions under that throughout the country, for the express purpose of focusing on that relationship, and we have made it clear to all of our investigators currently on the payroll and will be hired as the increased staff comes on-board when and if the budget gets approved, that this is part of their job, too, to do employer labor relations. We are committed to that and we will be working very effectively with the employer and the labor community, because I absolutely agree with Mr. Paras, that this will only work if the employers of America and the American public do it as a voluntary compliance measure.

OPENING JOBS FOR U.S. CITIZENS

One last point: I think again to many of my friends who were at the table before, particularly the interest groups, this is a tremendous opportunity to provide jobs for American citizens and legal aliens. I know you say it is not a jobs bill, and it is not, but immigration reform is a tremendous corollary aspect of job development and welfare reform. Just about every person in Congress, including Chairman Kennedy, has been pushing for work instead of welfare, and it is interesting that Ronald Reagan has been pushing that since early 1970s when he was Governor of California, and again a lot of opportunities for jobs for U.S. citizens and legal aliens that tie into this, and I would hope the Chamber of Commerce, the labor unions, and others will work very closely with the Department of Labor and others and us—we are not in the job business—let us be sure that jobs that have been held by illegal aliens or might be, can be filled particularly in many cases by disadvantaged Americans, a tremendous opportunity and a tremendous bank of jobs there, so I think that can be another positive aspect of this whole program, that this is an effective American policy and one that is in everybody's interest to do.

But we are going to be reasonable, it is going to be a transition mode and I am convinced that it will work very effectively. Thank you. I appreciate your endurance of my long remarks.

CONGRESSIONAL INTENT

Senator Simpson [presiding]. I think many of us are interested in those remarks, and just another question and then we will wind down here.

You now have had a chance to visit with every single Congressman involved in this caper since it was signed in November. There is this continual criticism that the INS regulations do not follow congressional intent. Of course, if some of the groups who say that had had their way we would not have an oversight hearing today; there would be nothing to oversee, and oddly enough they would have just left 2 to 12 million people hanging around out there while they continue to talk about the rights of humans. That is a very interesting adventure in that. I have always been dazzled by that—conservatives, liberals, whoever, want to go back, you know, to what it was before. I do not, not one bit.

But I believe the regulations are reasonably consistent with the legislation. I want to ask you, based on your discussions with Members of Congress—for example, Chuck Schumer, who could not have been a more extraordinary ally on this bill than that delightful Democrat from Brooklyn—I believe he referred to the regulations as "tough but fair," that is my recollection. I know the personal things that those of us who have been involved in it have shared with each other, but what has been the general response to the regulations from some of the players and the non-players in Congress.

Mr. Nelson. As you say, Mr. Chairman, we have had extensive discussions in hearings and otherwise with Members of Congress, particularly those that have been deeply involved in the development and passage of the Immigration Reform and Control Act. Yesterday, Mr. Disler and I and a number of others spent 4½ hours before Congressman Mazzoli and his committee. There have been a number of other discussions.

Overall, again not only with Members of Congress but with the public generally, I would say the response, certainly the response on the process has been very favorable by almost everybody. On the substance, it varies obviously with difference of opinion, but overall on balance pretty well. We probably would get shot at equally from both sides and maybe you are not too far off target.

Again, the fact that we have gone through the process we have, we have gotten all the comments, we have considered them, we are reviewing them. We are, of course, at the same process now and will be through the end of the comment period on April 20th. Of course, as you have indicated, too, I guess all of us are guilty of assuming the other body or whatever is monolithic, just like people say the White House or the administration, like everybody is absolutely the same, and certainly in terms of the Congress is the same. Congressional intent in some cases is extremely clear and in other cases it is subject to differences. That came out yesterday in the House, two different Members were saying, well, congressional intent was in conflict with each other, I think there is some of that.

So I think Mr. Disler's comments I endorse, too, on the intent standard on the discrimination issue, anti-discrimination, that we think we have properly interpreted congressional intent, both in the broad sense and in the specific sense when applicable.

NOMINATION OF SPECIAL COUNSEL

Senator **Simpson**. Well, I have one other question of Mr. Disler then that had to do with the Special Counsel. I think all of us are very interested in seeing that person selected and moving forward. It is interesting to me, as those who speak of delay of the appointment and establishment of operating regulations there, that under Title VII of the Civil Rights Act of 1964, there was a 1-year delay in doing anything there. I just want to ask what is the status of the selection of the Special Counsel and when might this committee and the chairman receive that nomination?

Mr. **Disler**. Senator, as I understand it, the search for the special counsel nominee is in its final stages. I cannot predict when the nominee will be sent up. It is going to be as soon as we can do it.

Let me say also, because I did not want to leave a misimpression that I heard this morning—the fact that our proposed regulations did not make reference to the many things we are doing to establish the office, it hardly means we have not been working very hard to get it up and running. We are doing a number of different things.

We have requested funding, we are searching for the staff and we hope to get the permanent nominee up as quickly as we can. We are aware of the timeframes.

Senator **Simpson**. I think the sooner the better.

Mr. **Disler**. We agree with that.

Senator **Simpson**. And I agree with those on various sides here that, no matter which test with regard to discrimination and intent, no matter which test applies, intent or effects, I think the intent test is going to cover every kind of employer discrimination we can reasonably imagine that could result from employer sanctions.

RULES FOR RECRUITERS

One other item. My phone system is broken down and the mail room has collapsed, with regard to recruiters and referers. We did indeed include recruiters and referers in the verification requirements. I think we may not, or I may not, have fully—I will not blame anybody else—fully comprehended the operations of the head hunter professions in America, and that is a very valid and remarkable and excellent service to America. And they obviously were not paying much attention either, I was not and they were not.

The regulations requiring verification of all employers recruited and all employees referred will not work in a business conducted in the main by telephone, and I just think we need a proposed change. I would like the Service to consider, I urge the Service to draft—and I will assist and I know Senator Kennedy would help—the final regs in a fashion that will allow those businesses to continue to operate in the way they do.

Mr. **Nelson**. Mr. Chairman, I might just comment on that.

Senator **Simpson**. Yes.

Mr. NELSON. That issue, of course, came up in the House hearing also and the lobbyists and lawyers for these groups are doing very well by that issue. I assured the House, I assure you, following your comments, I think again technically the way the law reads, probably everybody would have to verify everybody by phone or anything else.

We agree that the rule of reason and common sense is applicable and that is going to be modified so we think it will be handled reasonably, so hopefully your phone and mail box will not be inundated.

FREE IMMIGRATION COUNSELLING FOR LEGALIZATION

Senator SIMPSON. Okay. Then I think all of us ought to take a look at that editorial comment this morning in the Washington Post, "Getting ready for amnesty." That is the kind of spirit that we knew would be present in the United States. It is called helping your fellow man without taking a penny.

Mr. NELSON. May I comment on that, too, if I might? I agree that that was an excellent editorial and I give commendations to the Post for that. I think that points out another very important point, going back to the public affairs campaign. Very often people say, well, the job is all the government's. I think we all realize, both of us working in government and outside, that this is a partnership of the government and others and particularly the voluntary agencies.

I commend those not only referred to in the Post today but the others here, they have done a lot in getting the word out and the message is really very simple, gather all the documents that will support your claim, filling out the form and all of that is really not that complicated once you get all the material, and I think they have done a generally good job, so I think they both deserve some credit and maybe some criticism on the other hand if they sit back and accuse the government for not getting the word out.

We are doing a lot of it and they are doing a lot of it and we continue to do it and I think that is a very important theme.

Senator SIMPSON. Well, I think this is voluntariness in its most crystalline form here, when they are just doing it as pro bono. I notice a law firm is named. I might imagine that the firm of Bob Strauss would be right up front on that, a Texan who understands this terribly tough issue and a guy I have come to know well whose sense of duty and fairness and compassion is as broad and rich and remarkable as his earthy and gentle humor.

So I commend those people for publishing that book and doing voluntarism as it should be done. With that, thank you very much, Commissioner and Mr. Disler.

[The prepared statement of Mr. Disler, with attachment, follow:]

STATEMENT OF

MARK R. DISLER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee:

I welcome this opportunity to return before the Committee to answer questions about implementation of the anti-discrimination provisions of the Immigration Reform and Control Act of 1986. I assume that my earlier written statement and oral remarks are part of the same proceeding and I would only like to stress a few points quickly:

- The Department of Justice and those others in the Administration involved in implementing the new Act are dedicated to its full and faithful implementation, including the vigorous enforcement of the anti-discrimination provisions.
- As we have said over and over again, in hearings while this legislation was under consideration, in testimony at a House oversight hearing in December, in appearances in various forums, in the release accompanying our proposed rules concerning the anti-discrimination provisions, in the proposed rules themselves, in my written and oral remarks at the

beginning of this hearing, and as I wish to make crystal clear once again: the methods employers must use to verify an individual's identity and entitlement to employment are not difficult. There is no excuse for an employer to deny employment to those legally entitled to it in order to avoid hiring or retaining an individual whose employment could lead to sanctions.

- The search for a Special Counsel is in its final stages.
- We have requested funding for a thirty-person office for the balance of this fiscal year and funding to support a doubling of the staff in fiscal year 1988.
- Last month, Attorney General Meese announced that Bill Tyson, formerly Director of the Executive Office of U.S Attorneys, will be Chief Hearing Officer overseeing the Administrative Law Judge program.
- We published a notice of proposed rulemaking to effectuate the anti-discrimination provisions on March 23. The public comment period runs until April 22, 1987. We encourage such comment.
- As the chairman of the subcommittee noted in his opening remarks at the beginning of this hearing on March 24, the Executive Branch as a whole is moving into somewhat uncharted waters here, but we believe we are navigating them well and look forward to the public input.

U.S. Department of Justice

Civil Rights Division

Deputy Assistant Attorney General

Washington, D.C. 20530

APR 9 1987

I have attached the portion of the preamble to the Department's Notice of Proposed Rulemaking which addresses some of the bases of our view that the anti-discrimination provisions of IRCA reflect an "intent" standard, as well as a brief discussion of that standard.

Mark R. Disler
Deputy Assistant Attorney General
Civil Rights Division

Attachment

II. Standard of proof

The general rule prohibiting unfair immigration-related employment practices in section 102 of the Act is codified in § 44.200(a) of the proposed rule. The prohibition is modeled after section 703(a)(1) of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)(1)), a provision that has generally been the basis of the requirement to prove intentional discrimination either by direct evidence or by inference. Section 102, notably, does not contain an analogue to paragraph (2) of section

703(a) of title VII, which has generally been the foundation of the prohibition against certain forms of unintentional discrimination merely on the basis of their disparate impact. Consequently, § 44.200(a) of the proposed rule explicitly prohibits only those employment practices where a person or entity has "knowingly and intentionally" discriminated or has engaged in "a pattern or practice of knowing and intentional discrimination."

Moreover, Congress' purpose in enacting section 102 is clearly to address intentional discrimination. The underlying purpose of section 102 is to counter potential discrimination caused by the desire of employers to avoid the sanctions imposed by the Act for hiring unauthorized aliens. Congress feared that employers, seeking to avert any possibility of sanctions being imposed on them, would simply refuse to hire "foreign looking" or "foreign sounding" persons. See, e.g., H. R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87 (1986); H. R. Rep. No. 99-682, 99th Cong., 2d Sess., pt. 1 at 68 (1986). This type of activity necessarily reflects intentional discrimination.

Congress further indicated its desire for an "intent" standard of proof elsewhere in section 102 by providing that a private individual is authorized to bring a complaint directly before an administrative law judge that is based on allegations of "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity," if the Special Counsel has not acted on the charge within 120 days of its receipt (sec. 274B(d)(2)). The House Judiciary Committee in its section-by-section analysis of section 274B(d) noted that it "authorizes private action where the Special Counsel has not filed a complaint within 120 days based on a charge alleging knowing and intentional discriminatory activity or a pattern or practice of _such_ activity." H. R. Rep. No. 99-682, 99th Cong., 2d Sess., pt. 1 at 93 (1986) (emphasis added). Moreover, in explaining its use of the term "pattern or practice" in a different portion of the Act dealing with criminal sanctions against employers, the House Judiciary Committee emphasized that "pattern or practice" refers to intentional activities and noted that this interpretation should apply in the unfair immigration-related employment practices context as well.

> [T]he term "pattern or practice" has its generic meaning and shall apply to regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts. _The same interpretation of "pattern or practice" shall apply when that term is used in this bill with regard to the injunctive remedy that may be sought by the Attorney General for recruitment, referral or employment violations, as well as for certain unfair immigration-related employment practices_.

_Id_. at 59 (emphasis added).

Under this standard it is not sufficient to allege that a pattern or practice of activity results in discriminatory effects. Discriminatory intent may be shown, of course, by both direct and circumstantial evidence. Thus, the discriminatory intent standard clearly encompasses more than just cases where employers have made blatantly bigoted remarks. Indeed, the model of proof enunciated in _McDonnell Douglas Corp. v. Green_, 411 U.S. 792 (1973), and _Texas Department of Community Affairs v. Burdine_, 450 U.S. 248 (1981), is applicable. Moreover, statistics may be used in appropriate cases to aid in proving discriminatory intent.

Questions from Senator Alan K. Simpson

1. Please describe the types of discrimination you intend to cover under your proposed standard of proof, and what types of evidence may be submitted to satisfy this standard. Are you proposing to include the "disparate treatment" standard, and how does this differ from the "disparate impact" standard?

We have proposed a "disparate treatment", i.e., intentional discrimination, standard for the anti-discrimination provisions of the Immigration Reform and Control Act. Both direct and circumstantial evidence may be used to prove intentional discrimination. The model of proof enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) is applicable. Thus, an individual would make a prima facie showing by proving that he or she is part of a national origin or citizenship group, that he or she applied for a job and was rejected, that the job was kept open and given to another individual of similar qualifications. At this point, the burden of production shifts to the employer to come forward with a nondiscriminatory explanation for the rejection of the charging party. If an explanation is produced, the charging party then has the opportunity to show that this reason was a pretext and the purpose of the employer's refusal to hire him or her is because of national origin or citizenship status. Moreover, statistics may be used in appropriate cases to aid in proving discriminatory intent.

2. What progress toward establishing the Office of Special Counsel has been made. Has an acting special counsel been named?

President Reagan named Mary E. Mann Acting Special Counsel for Immigration-Related Unfair Employment Practices on April 16, 1987. By notice in the Federal Register, Ms. Mann's address was made known to the public:

Mary E. Mann
Acting Special Counsel for Immigration-Related Unfair Employment Practices
P.O. Box 65490
U.S. Department of Justice
Washington, D.C. 20035-5490

We have obtained office space and procured equipment and supplies. We are also in the process of hiring personnel for this office.

We are also reviewing comments to the Notice of Proposed Rulemaking published on March 23, 1987 which addresses the anti-discrimination provisions of the Act.

The Attorney General has selected William Tyson as chief hearing officer to oversee the administrative law judges who will hear complaints under the anti-discrimination provisions as well as under the sanctions provisions.

Senator SIMPSON. The subcommittee will convene again at the hammer of the Chairman, Senator Kennedy. Thank you very much.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned subject to call of the Chair.]

APPENDIX 1

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510

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RICHARD W. DAY, MINORITY COUNSEL

April 21, 1987

Hon. William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
10th and Constitution Ave., N.W.
Washington, DC 20530

Dear Mr. Reynolds:

We write to reiterate the concern expressed in recent hearings -- both within the full Judiciary Committee and the Subcommittee -- regarding the Department's proposed regulations interpreting Section 102 of the Immigration Reform and Control Act of 1986. This section makes it an "unfair immigration-related employment practice" to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment" because of the individual's national origin or citizenship status. Section 274B(1).

At issue is the insertion of the phrase "knowingly and intentionally" into the definition of "unfair immigration-related employment practice" in the proposed regulations, which would limit the discrimination prohibited by the Act to those instances in which discriminatory intent could be established. In our view, this proposed limitation is flatly inconsistent with the clear language of the Act, as well as Congressional intent.

It is clear from the face of the statute that Congress specifically determined that an unfair immigration-related employment practice need not be "knowingly and intentionally." This is apparent when the statutory definition of "unfair immigration-related employment practice" in section 274B(a)(1) is compared with section 274B(d)(2), the provision in the Act stipulating when a person making a charge respecting an unfair immigration-related employment practice may file a complaint directly with an administrative law judge.
Section 274B(d)(2) expressly limits the circumstances in which such a direct complaint may be filed to those "respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity." The existence of this limitation in section 274B(d)(2), and the absence of any requirement in section 274B(a)(1) that an unfair immigration-related employment practice be "knowing and intentional" clearly demonstrates that the Act does not require a showing of discriminatory intent to establish an unfair immigration-related employment practice.

But even if one were to take the view that the statute is unclear on this point -- which I don't -- the legislative history of the Act demonstrates that Congress did not intend to require proof of discriminatory intent to establish an unfair immigration-related employment practice.

Section 102 resulted from the concern of many in the Congress that the existing protections of Title VII were not sufficient to address the kind of discrimination which might arise as a result of employer sanctions. This view is reflected in the Conference Report, H.R. Conf. Rep. No. 1000, which states that the anti-discrimination provision of the new law "*broadens* the Title VII protections against national origin discrimination . . . ." id. at 87.

As you know, Title VII has long been recognized to outlaw both those employment practices that have the *purpose* of excluding members of a protected class as well as those practices that have an unintended discriminatory *effect*. Compare *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) with *Griggs v. Duke Power Co.* 401 U.S. 424 (1970). The congressional debates about the Immigration Reform and Control Act's anti-discrimination provision evidence Congress' recognition of the broad scope of Title VII and Congress' intention to extend those standards of liability to small employers.

The legislative history leaves no doubt that Congress intended Section 274B to reach not only discrimination motivated by bigotry, *see e.g.*, 130 Cong. Rec. H5617 (daily ed. June 12, 1984), but also the "unknowing and unwitting discriminatory aspects" of sanctions. *Id.* at H5641 (statement of Rep. Frank that the provision is prepared to deal with "any discrimination that might arise").

Congress intended to prevent virtually all barriers to the employment of legally resident foreign, foreign-looking or foreign-sounding employees that might be erected by employers seeking to protect themselves against citations, fines or merely enhanced governmental scrutiny under Section 274A. Such barriers can consist not only of intentionally discriminatory practices -- such as "citizen-only" rules or a refusal to hire anyone with accented speech or dark skin, hair and eyes -- but also of facially neutral policies, such as "English-only" rules, lengthy residence requirements, or a hierarchy of preferred documents for employee verification. The former can be challenged under disparate treatment analysis, the latter under disparate impact analysis. It is legally irrelevant whether the employer's motivation for erecting the barrier is actual prejudice against protected groups or merely misguided self-protection in the face of Section 274A.

The Justice Department's assertion that the "disparate impact" standard of liability in Title VII is derived from a particular clause in that law (for which there is supposedly no analogue in Section 274B) has been consistently rejected by the courts whenever they have confronted the question. Most recently, the Seventh Circuit held that the disparate impact standard derives from Title VII as a whole and that claims brought solely under Section 703(a)(1) are nonetheless subject to disparate impact analysis. *Colby v. J.C. Penny Co. Inc.*, F.2d ____ (7th Cir. February 10, 1987) (No. 86-1500). *See also Wambheim v. J.C. Penny Co. Inc.*, 705 F.2d 1492 (9th Cir. 1983). Thus, the legal premise of the Department's argument is wholly without support.

The intent of Congress is further evidenced by the numerous other statutes which are favorably cited as sources for interpreting Section 274 (*see* H.R. Rep. No. 682, pt. at 59) that allow for disparate impact analysis.

The proposed regulations cite nothing from the legislative history that is inconsistent with this interpretation. The language regarding "pattern or practice" cases from the House Report quoted in the proposed regulations (from H.R. Rep. No. 682, pt. at 59) merely repeats the common understanding that the term "pattern or practice" does not apply to "accidental acts"; an intention to commit the acts that constitute the pattern or practice is required. Indeed, courts construing the "pattern or practice" provision in Title VII have squarely held that a racially disparate impact may be sufficient to establish liability in a pattern or practice case. See United States v. Commonwealth of Virginia, 620 F.2d 1018 (4th Cir. 1980).

Finally, it would be illogical and irrational to subject employers to different standards of liability based solely on the size of the workforce. The practices identified in the February 26, 1987 Policy Statement of the Equal Employment Opportunity Commission as constituting potential violations of Title VII are no less likely to be engaged in by small employers. These are precisely the kinds of practices that Congress wished to guard against by including Sec. 274B within the new immigration law. Such practices are equally offensive and violative of individual rights whether engaged in by a small or large employer. Congress recognized this and provided the same protection for all workers. The Department's proposed regulations requiring proof of intent would thwart that purpose.

We assume the Department will revise the draft regulations accordingly, and we will look forward to hearing from you before the final regulations are issued.

Sincerely,

Edward M. Kennedy
Chairman

APPENDIX 2

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

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April 7, 1987

Mr. Paul Grossman, Esq.
Paul, Hastings, Janofsky & Walker
Twenty-Second Floor
555 South Flower Street
Los Angeles, CA 90071

Dear Paul:

I am writing to solicit your expertise on an important question concerning interpretation of the "Frank amendment" to the Immigration Reform and Control Act of 1986.

I am contacting you because of your co-authorship, along with Barbara Schlei, of the leading textbook in the employment discrimination law field, Employment Discrimination Law (BNA, 1983), and because of the previous testimony you presented before this committee: "Anti-discrimination Provision of H.R. 3080," Joint Hearing before the Senate Committee on the Judiciary (No. 99-104), and House Committee on the Judiciary (Serial No. 35), October 9, 1985.

Question has arisen over whether the Frank amendment covers only "intentional" acts of discrimination based on the new grounds created by the amendment, or whether both "intentional" discrimination and actions having an "adverse impact" on individuals newly included by the amendment should be covered. Could you please tell the committee whether one or both of these standards is appropriate, and why? Could you also include in your answer a discussion of whether employer sanctions are likely to be responsible for "unintentional" acts of discrimination that nonetheless would have an adverse impact on legal U.S. residents who "look or sound foreign?"

Thank you for your assistance in this matter.

Most Sincerely,

Alan K. Simpson
United States Senator

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1987 APR 27 PM 4:21

APR 27 RECD

April 21, 1987

OUR FILE NO.

The Honorable Alan K. Simpson
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: "Frank Amendment" - Disparate Treatment (Intentional Discrimination) or Adverse Impact (Unintentional Discrimination)

Dear Senator Simpson:

Thank you for your letter of April 7. My interpretation of the antidiscrimination provisions of the Immigration Reform and Control Act of 1986 is that they prohibit only intentional discrimination. I base this on the legislative history which clearly defines the reason and need for the antidiscrimination provisions, to wit, a fear that uninformed employers, knowing of the existence of employer sanctions should they hire persons not entitled to work, will overreact and refuse to consider for employment anyone who "looks or sounds foreign." This is what the antidiscrimination provisions were intended to prohibit, and this is a classic example of disparate treatment (intentional discrimination).

The adverse impact theory was developed under Title VII to deal with neutral employer practices which nevertheless disqualified at a disproportionate rate a protected group. Typical examples are IQ tests (an applicant must get a passing score on an IQ test) or educational requirements (an applicant must have a college degree). It would be difficult to imagine a neutral practice such as this which would have an adverse impact on aliens entitled to work which would not already be prohibited by Title VII.

In summary, the purpose of the antidiscrimination provisions of the immigration bill was clearly to make illegal intentional employer overreaction to sanctions, which is pure disparate treatment (intentional discrimination). Even if one were for some reason to want to go beyond the legislative intent, there would be no purpose, since any neutral practice which would have an adverse impact on aliens would also have an adverse impact on a category protected by Title VII, and would thus be totally unnecessary. Involving two different agencies, the Justice Department and the EEOC, in attacking practices such as educational requirements would seem to make no sense even if one were willing to go beyond the legislative intent that led to the "Frank amendment." The antidiscrimination provisions of the immigration bill should be limited to the type of discrimination which led to their enactment, disparate treatment (intentional discrimination).

I hope this is of assistance.

Sincerely,

Paul Grossman

APPENDIX 3

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
THE CHAIRMAN

FEB 27 1987

The Honorable Edward M. Kennedy
Chairman
Committee On Labor And Human Resources
Washington, D. C. 20510

Dear Senator Kennedy:

By unanimous vote, the Equal Employment Opportunity Commission has adopted the enclosed Policy Statement concerning the continuing requirements of Title VII of the Civil Rights Act of 1964 in the wake of the Immigration Reform and Control Act of 1986. The Policy Statement makes clear that the nondiscrimination requirements of Title VII remain in full force and effect following the enactment of the Immigration Act. The Commission will continue to enforce vigorously Title VII's prohibition on national origin discrimination in accordance with its existing guidelines and instructions to its field staff. Summarizing this existing guidance, the Policy Statement lists eight specific employment practices which may constitute discrimination on the basis of national origin, and urges employers to avoid these practices as they develop procedures for complying with the new Immigration Act.

This Policy Statement is but one part of a comprehensive action plan being implemented by the Commission to combat any discrimination which may arise as a result of the Immigration Act. Other Commission activities in this area include:

1. Coordination with the General Accounting Office to ensure that the Commission provides relevant data to assist GAO in fulfilling its statutory obligation to study the impact of the Immigration Act on national origin discrimination;

2. Development of an EEOC educational campaign to ensure that employers, employees and applicants are made aware of the nondiscrimination requirements of Title VII and their applicability to immigration-related practices;

3. Coordination with the Immigration and Naturalization Service on its educational campaign concerning the Immigration Act to ensure that employers are made aware of their obligation to avoid discriminatory conduct;

4. Development of coordinated procedures with the Department of Labor, possibly including a memorandum of understanding to ensure that Labor refers to the Commission for appropriate Title VII enforcement action in instances where employers seek verification of employment authorization only from individuals of particular national origins;

5. Development of coordinated procedures with the Department of Justice, possibly including a memorandum of understanding, to ensure that individuals complaining of immigration-related discrimination do not lose their rights as a result of filing a charge with the wrong enforcement agency;

6. Review of draft regulations by the Department of Justice to ensure the development of coordinated charge filing procedures under Title VII and the Immigration Act; and

7. Review of draft regulations of the Immigration and Naturalization Service to ensure that the implementation of employer sanctions is accomplished in a manner consistent with Title VII.

Commissioner Fred Alvarez has offered to meet with any Members of Congress who would like additional information on the Commission's activities to ensure continued compliance with equal employment opportunity laws as the Immigration Act is implemented.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

EEOC POLICY STATEMENT

Relationship of Title VII of the Civil Rights Act to the Immigration Reform and Control Act of 1986

(adopted February 26, 1987)

With its enactment of the Immigration Reform and Control Act of 1986, Congress for the first time has made it unlawful for an employer to hire individuals who are not legally authorized for employment in the United States. While adopting these new requirements, Congress was also concerned that some employers might overreact and refuse to hire individuals who appeared or sounded "foreign." Although Congress recognized that the existing prohibitions on national origin discrimination in Title VII of the Civil Rights Act would cover much of the potential discrimination, Congress also included in the Act a new nondiscrimination provision, to be enforced by the Department of Justice, which prohibits national origin discrimination by smaller employers not covered by Title VII and discrimination because of citizenship status by all employers with four or more employees.

Since the Immigration Act went into effect on November 6, 1986, public discussion of the effect of the new law on employment practices has not focused on the continuing requirements of Title VII. Rather, public attention has been directed primarily to the requirements of the new statute and the procedures by which it will be enforced. The Immigration Act, however, leaves in full force and effect the provisions of Title VII which ban discrimination in employment on account of national origin. See Section 102 (b) of the Immigration Reform and Control Act of 1986. The Commission, therefore, wishes to reaffirm that it will continue vigorously to enforce the nondiscrimination provisions of Title VII in accordance with its published guidelines and its existing instructions to its field staff. Commission employees are instructed to review this existing guidance, briefly summarized below, to ensure that they will be alert to any discrimination problems which may arise as a result of the Immigration Act.

BASIC NONDISCRIMINATION REQUIREMENT

Title VII bans employment practices which subject individuals to different or unequal treatment on account of their national origin. Consistent with this basic nondiscrimination principle, the Immigration Act requires an employer to verify that all individuals hired after the effective date of the Act are legally authorized for employment in the United States.

An employer who seeks such documentation only from "foreign looking" applicants or employees may violate both the Immigration Act and Title VII. Thus, an employer who scrupulously complies with the requirements of the Immigration Act as to all new employees will eliminate one important source of potential discrimination.

OTHER EMPLOYMENT PRACTICES WHICH MAY VIOLATE TITLE VII

In addition to complying with the Immigration Act, an employer must also continue to ensure that it does not discriminate against individuals in hiring, or any other aspect of employment, based on their national origin. Employers should not mistakenly conclude either that they can avoid problems under the Immigration Act by ceasing to employ individuals of a particular national origin, or that the Act in any way sanctions less than full equal opportunity for employees of all ethnic backgrounds. Acting on such mistaken beliefs will merely precipitate violations of Title VII. Particular attention should be paid to the following employment practices as they may violate Title VII under the circumstances described below:

1. **Refusal to Hire.** It is unlawful to refuse to hire an individual because of the individual's, or his or her ancestor's, place of origin or because the individual has the physical, cultural or linguistic characteristics of a particular national origin group. It is also unlawful to refuse to hire an individual because of the individual's marriage to or association with members of a national origin group, or because the individual's name or spouse's name is associated with a particular national origin. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. 1606.1.

2. **Accent.** It is unlawful to discriminate against an individual because of the individual's accent or manner of speaking unless the employer can show a legitimate, nondiscriminatory reason for its action. Where an employer claims that the individual's accent interfered with job performance, the Commission will carefully investigate the kinds of communications required by the job and the individual's ability to engage in those communications successfully. See EEOC Policy Statement on Discrimination Based on Manner of Speaking or Accent, adopted in August 1986 and filed in section 623 of the EEOC Compliance Manual.

3. **Harassment.** Harassment of employees on the basis of their national origin is unlawful under Title VII. Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) has the purpose or effect of creating an intimidating, hostile or

offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. 1606.8.

4. **Speak-English-Only Rules.** Rules which require employees to speak English only at all times are presumptively unlawful because they unduly burden individuals whose primary language is one other than English, and tend to create a hostile or discriminatory work environment based on national origin. An employer may have a more limited rule, requiring that employees speak only in English at certain times, where the employer can show that the rule is justified by business necessity. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. 1606.8.

5. **Height or Weight Requirements.** Height or weight requirements are unlawful where they disproportionately disqualify individuals of a particular national origin and are not related to successful job performance. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. 1606.6 (a)(2); Dothard v. Rawlinson, 433 U.S. 321 (1977).

6. **English Fluency Requirements.** English fluency requirements may violate Title VII if they are adopted for discriminatory reasons or are not applied equally to all employees or applicants. Such requirements may also be unlawful if they disproportionately disqualify individuals of a particular national origin and are not shown to be job-related. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. 1606.6 (b)(1); EEOC Compliance Manual, Sec. 623.9.

7. **Aptitude or Other Employment Tests.** Under existing law and applicable guidelines, aptitude or other employment tests may violate Title VII if they are not applied equally to all applicants, or if they disproportionately disqualify applicants of a particular national origin and are not shown to be related to successful job performance. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. 1606.6; Griggs v. Duke Power Co., 401 U.S. 424 (1971).

8. **Citizenship Requirements or Preferences.** Citizenship requirements or preferences may be unlawful under Title VII if they have either the purpose or effect of discriminating against individuals because of their national origin. See EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. 1606.5; EEOC Compliance Manual, Sec. 622; Espinoza v. Farah Manufacturing Co. 414 U.S. 86 (1973). A citizenship requirement has a discriminatory effect if it disproportionately

disqualifies individuals of a particular national origin and is not justified by a business necessity. An employer may not defend such a practice simply by showing that it hired other individuals of the same national origin who met the citizenship requirement. Connecticut v. Teal, 457 U.S. 440 (1982).*

FUTURE GUIDANCE

The Commission will be issuing further guidance for its field staff in the near future which will: (1) summarize in detail the provisions of the Immigration Act, including the employer sanction and nondiscrimination provisions; (2) explain the respective jurisdictions of the EEOC and the Department of Justice over immigration-related discrimination; and (3) provide more detailed instructions on how to process charges of immigration-related discrimination. In the interim, employees having questions on these topics may obtain assistance by calling the attorney of the day in the Guidance Division, (FTS) 634-6423. Members of the public having questions on these matters may call (202) 634-6922.

*While the Immigration Act also prohibits discrimination on the basis of citizenship in some circumstances, that Act specifically states that it is not a violation of the Immigration Act to prefer a citizen over an alien where both are equally qualified. Employers should be aware, however, that such citizenship preferences may still violate Title VII if they have the purpose or effect of discriminating on the basis of national origin.

APPENDIX 4

NATIONAL COUNCIL OF
LA RAZA
Raúl Yzaguirre, President

National Office
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Washington, D C 20001
(202) 628-9600

MEMORANDUM

TO: Interested Parties
DATE: April 6, 1987
SUBJ: Attached Paper
FROM:

National Council of La Raza

AFL-CIO

American Civil Liberties Union

American Council for Nationalities Service

American Immigration Lawyers Association

Church World Service/Nat'l Council of Churches

International Ladies Garment Workers Union

League of United Latin American Citizens

Lutheran Immigration and Refugee Services

Mexican American Legal Defense and Education Fund

National Association of Latino Elected and Appointed Officials

National Puerto Rican Forum

United States Catholic Conference

The above-signed organizations have collectively endorsed the analysis and recommendations included in the attached paper, entitled "Selected Immigration Bill Implementation Issues".

The coalition and many of the above-signed organizations will also develop more detailed comments on these and other issues.
residents may be denied jobs because of employer confus

SELECTED IMMIGRATION BILL IMPLEMENTATION ISSUES

I. OVERVIEW

This memorandum briefly describes and analyzes selected issues related to the implementation of the Immigration Reform and Control Act of 1986 (IRCA), and has been prepared on behalf of a coalition of national civil rights, civil liberties, religious, labor, and ethnic groups. The coalition previously has endorsed joint comments on preliminary regulations and issued joint press statements on the implementation of the immigration bill.

Each issue is described with an update on its status. The implications of each issue are addressed, followed by a coalition recommendation (in bold face).

II. LEGALIZATION

A. Regulatory Issues

1. Continuous Physical Presence

The IRCA requires legalization applicants to establish "continuous physical presence" in the United States from November 6, 1986, to the date of application except for "brief, casual and innocent" absences.

The proposed INS regulations state that only absences which are (1) authorized by INS; (2) for "legitimate emergency or humanitarian purposes"; and (3) not longer than 30 days (unless a longer period is expressly granted by INS) will be considered "brief, casual and innocent."

This definition is unreasonable on several grounds. First, it is inconsistent with the statute, which expressly authorized a more liberal interpretation of the provision. Second, it is inconsistent with the confidentiality provision of the Act, designed to ensure that potential applicants need not reveal their identities to INS before applying. Third, it is an after-thefact requirement imposed on potential applicants without sufficient prior notice (INS urged potential applicants not to come to their offices immediately after passage of the bill). Failure to modify the proposed rule would preclude the legalization of many otherwise eligible persons who left the country briefly to celebrate the Christmas holiday, or for other innocent reasons.

The coalition recommends that:

(1) **Failure to seek and receive INS permission for absences should not make an applicant ineligible;**

(2) **The "brief, casual and innocent" exception should be broadly interpreted, and not limited to "emergency or humanitarian purposes";**

(3) **The 30-day limit be extended substantially.**

2. Continuous Residence

Applicants must establish "continuous residence" in the United States since prior to January 1, 1982, to the date of application, except for "brief and casual" absences.

The proposed rules limit "brief and casual" absences to 45 days for a single absence and aggregate absences totalling no more than 180 days. Absences exceeding set limits may be waived on a case-by-case basis.

The definition is unnecessarily restrictive. Administrative and case law in the context of registry and naturalization suggest that single absences of six months and aggregate absences of two and one-half years do not disturb continuity of residence. The effect of this definition would be to deter otherwise eligible applicants from applying, or if they do apply, to require excessive numbers of waiver requests. Such waiver requests will complicate the application process for applicants, those providing assistance to applicants, and the INS.

The coalition recommends that **the INS set the limit for single absences at 90-180 days and aggregate absences at one-two years.**

3. Documentation

Applicants must establish both proof of identity and proof of residence through documents, together with independent corroboration. Congress stated that, "unnecessarily rigid demands for proof of eligibility for legalization could seriously impede the success of the legalization effort," and that it expects "INS to incorporate flexibility into the standards for legalization eligibility, permitting the use of affidavits for credible witnesses and taking into consideration the special circumstances" of the target population (House Report 99-682, part 1, p. 73).

The proposed rules limit evidence of identity to seven types of documents, listed in a descending order of preference. The proposed rules allow a broad list of documents to prove residence but appear to limit attestations only to "churches, unions or other organizations." Employers' letters and affidavits from institutions are required to follow a rigid formula, including items that may be burdensome to obtain or that may not be known to the person completing the document. The rules further require that many documents be submitted in the original, and establish an elaborate procedure for later return of the documents.

Congress intended that eligible applicants should be able to qualify for legalization in a straightforward, simple and efficient manner. However, the proposed regulations are ambiguous, contradictory, rigid and subject to misinterpretation. The limit on documents proving identity excludes other evidence regardless of credibility. Rigid formulas and requests for information that may be burdensome or that may not be known to persons providing such documents may deter employers or others from providing documents. Requirements regarding submission of originals are excessive, in part since such documents are also required to prove eligibility to work.

The coalition recommends that:

(1) **Evidence should not be judged on a rigid formula, but rather on the relevance and credibility of the documents submitted, including affidavits and statements;**

(2) **Applicants should be permitted to submit any and all credible evidence that has probative value in establishing residence and identity. Regulations should not limit the list of acceptable documents, establish a rigid order or preference, or impose pre-determined formats or burdensome requirements, e.g., notarization of affidavits.**

(3) **Applicants should be permitted to submit certified copies of documents, subject to making the original available at the interview for review and inspection.**

4. Public Charge

Under existing law, immigrants may be excluded if they are found "likely to become a public charge." IRCA includes a special rule providing eligibility for low-income applicants who can show a history of employment evidencing self-support without receipt of "public cash assistance." The statute prohibits waiver of the public charge exclusion when adjusting to permanent status.

The proposed regulations require applicants to show "proof of financial responsibility"; some applicants must prove that they or other members of their household have not received public cash assistance. Such assistance is defined to include "income or needs-based monetary assistance" and and excludes in-kind assistance and non-cash benefits (food stamps, housing), work-related compensation and "certain" types of medical assistance. The proposed rules eliminate a section in the preliminary draft rules which permitted waivers of the public charge exclusion for applicants for temporary status.

Congress provided that many low-income applicants who might otherwise be excluded should be eligible, recognizing that, once legalized, individuals will be less exploitable by employers and would command higher wages. The proposed rules are too restrictive in light of Congressional intent. Persons whose citizen children may have received some cash assistance should not automatically be excluded. The definition of public cash assistance, while generally acceptable (exclusion of non-cash benefits), implies that some medical benefits may be considered "cash"; this is clearly internally inconsistent. Permitting waivers for applicants for temporary status or permitting applicants to post a public charge bond would ensure that any marginal applicants could demonstrate self-sufficiency prior to adjustment to permanent status; otherwise, this exclusion may deter eligible persons from applying, or may deny legalization to such applicants.

The coalition recommends that:

(1) **Only the receipt of public cash assistance by the alien or undocumented family members — and not citizen children or other qualified persons — should be considered "receipt" of such assistance;**

(2) **All forms of medical assistance should be excluded from the definition of "public cash assistance";**

(3) **Waivers or public charge bonds should be granted to marginal applicants for temporary status who might otherwise be excluded.**

5. Spouses and Dependent Children

The treatment of ineligible spouses and minor children is an issue of particular sensitivity and importance to the coalition. The proposed regulations are silent on the issue; INS has indicated that judgments of these situations will be made under current rules on a case-by-case basis, at the discretion of individual District Directors.

It is likely that a substantial proportion of eligible applicants have spouses and minor children who may not be eligible. The absence of a uniform policy regarding ineligible family members of eligible applicants may lead to family break-ups, and risks inequitable or inconsistent treatment of similarly situated families in different Districts. Such family break-ups would be inhumane and inconsistent with the purpose of the program; in addition, failure to clarify the status of ineligible family members will deter many potential applicants from coming forward.

> The coalition recommends that **there be a uniform national policy deferring the deportation of ineligible spouses and minor children to preserve family unity.**

6. Fees

The IRCA provides that the Attorney General shall establish a schedule of fees for filing legalization applications. The proposed regulations contain a fee schedule of $185 for an individual application, a $50 fee for each minor child, and a family rate of $420. The INS justifies the proposed fee schedule by suggesting that such fees are comparable to those paid by legal immigrants, and are negligible compared to the benefit received, i.e., legal status.

The INS position: (1) Misleadingly compares two different procedures. The fees for comparable procedures (registry or adjustment of status petitions) are $50 and $85; (2) Misleadingly compares two different benefits. Legal immigrants immediately obtain permanent status, while legalization applicants obtain temporary status. The proposed fee will impose hardships on some applicants. Excessive fees may also deter those with marginal or difficult applications from applying (and given restrictive regulations, this could include a large portion of the eligible population).

> The coalition recommends that **application fees should be in line with those for comparable immigration procedures, such as the $50 registry fee and the $85 adjustment of status fee.**

7. Work Authorization

Enforcement of employer sanctions will be phased in, beginning on June 1, 1987. Employers are not required to verify the status of persons hired prior to November 6, 1986 ("grandfather clause"). Potential or actual legalization applicants who can demonstrate a case for legalization may not be deported.

The proposed regulations would permit employers to accept an attestation from legalization applicants — as a protection against sanctions liability — through September 1, 1987.

Despite the "grandfather clause," many employers have dismissed employees hired prior to November 6, who are suspected of being undocumented. Some of these persons are eligible for legalization, but may be subject to the public charge exclusion if unemployed. The proposed regulations are reasonable, with two exceptions. First, the September 1 cutoff date for employer acceptance of attestations by legalization applicants is not realistic, given the expected heavy volume of applications in the first three months of the program. Second, in the absence of sufficient public education efforts (see below), many employers may not accept the attestations and may refuse to hire or retain legalization applicants, jeopardizing such applicants' ability to legalize.

The coalition recommends that:

(1) **The period during which employers may accept attestations from legalization applicants be extended through the date of the legalization interview;**

(2) **INS provide clear, unequivocal instructions to employers to accept such attestations in order to maximize participation in the legalization program.**

B. Qualified Designated Entities

The statute requires the Attorney General to recognize certain "Qualified Designated Entities" (QDEs) to engage in outreach, application assistance, and initial processing of legalization applications. INS has issued a Cooperative Agreement that reimburses QDEs at a rate of $15 per completed application, and allows QDEs to charge counseling fees not to exceed a $75 "cap" per applicant.

The Cooperative Agreement is unworkable in its current form. The $15 reimbursement is inadequate, since outreach and processing costs (excluding counseling) will exceed $15, and since no reimbursement will be provided for clients who do not complete applications. Given the restrictive regulations, estimates of counseling costs range from $100 to $200 per applicant; complex cases may exceed those costs. Most potential QDEs plan to charge applicants based on a sliding fee schedule, with waivers for those unable to pay.

QDEs are to serve as a "buffer" between the INS and the target population in order to encourage and assist potential applicants to come forward. The QDEs would counsel applicants in preparing the complex legalization application and would help prevent exploitation of applicants by unscrupulous individuals. Many potential QDEs cannot accept the Cooperative Agreement, diminishing legalization "infrastructure." A weakened or diminished infrastructure will reduce applicants' ability to legalize and expose them to greater exploitation.

The coalition recommends that:

(1) **The INS negotiate in good faith with potential QDEs to ensure the workability of the Cooperative Agreement;**

(2) **Pending such negotiations, the Congress take swift action to ensure sufficient QDE capacity.**

II. EMPLOYER SANCTIONS AND ANTI-DISCRIMINATION

A. Employer Sanctions

1. I-9 Form and Work Authorization

Under the Act, employers must verify the eligibility of new hires by examining documents that demonstrate the employee's identity and authorization to work. This verification process is to be recorded on an "I-9 Form," which will be sent to all employers once final rules are issued. The proposed regulations permit attestation by legalization applicants (see above), but the I-9 Form itself contains no space or box for an employer to record the attestation.

Given the lack of public information about the Act and the already apparent tendency of some employers to over-react to employer sanctions, the absence of a specific reference to the acceptability of the attestation on the I-9 Form itself may deter some employers from hiring or retaining legalization applicants, especially after sanctions enforcement begins on June 1.

The coalition recommends that **acceptability of the attestation be noted on both the I-9 Form and accompanying instructions. A box or other space on the I-9 for the attestation should be created.**

2. Grandfather Clause and Information Period

IRCA explicitly states that sanctions do not apply to persons employed before the date of enactment (grandfather clause). The Act also establishes an "information period" (which ends on June 1, 1987) and prohibits the INS from enforcing sanctions "on the basis of any violation alleged to have occurred during the [information] period."

The proposed rules require employers to prove "grandfathered" employees were hired prior to the date of enactment. The regulations are silent regarding employer liability for hires during the information period. INS instructions note verification is not required for grandfathered employees, but state that employers may verify if they choose. The instructions require verification of employees hired during the information period, although I-9 Forms for this purpose are not available, and may not be available for some time.

Widespread confusion and implied threats of enforcement for hires during the information period have led and will lead many employers to verify persons hired prior to June 1, 1987, including "grandfathered" employees. Such "after the fact" verifications risk unnecessary terminations of persons eligible for legalization, and are inherently susceptible to differential or discriminatory application.

The coalition recommends that **INS require I-9 Forms only for persons hired after June 1, 1987, and the burden of proof should be on the INS to show that an employee was hired after that date.**

3. Subpoenas

The Act requires employers to retain I-9 Forms for three years, or one year in the case of terminated employees, and to make forms "available for inspection by officers of the [INS] or Department of Labor (DOL)."

The proposed regulations generally restate the statutory language, but add a duty to make records available "upon oral request." Even in the absence of employer consent, "no subpoena, warrant, or advance notice shall be required" for inspections of records.

There are no grounds to believe that Congress intended to establish such an unbridled right in government officials to inspect business records. Absent employer consent, the Supreme Court has held it unconstitutional for the government to obtain business records without a valid adminstrative subpoena.

The coalition recommends that **subpoenas be required to inspect I-9 Forms absent consent by an employer or authorized management official.**

B. Anti-discrimination Provisions

The Act extends protection against discrimination based on national origin to employers of 3-14 employees (Title VII of the Civil Rights Act of 1964 covers employers of 15 or more employees). IRCA also prohibits discrimination on the basis of citizenship (unless otherwise required by law). However, such protection only covers aliens who apply for naturalization within six months of becoming eligible — or six months after the date of enactment, whichever is later — and who actually naturalize within two years of becoming eligible, and aliens not yet eligible for naturalization who declare an intent to become citizens ("intending citizens"). An Office of Special Counsel in the Justice Department is created to investigate and bring complaints before an Administrative Law Judge. Victims must file complaints within 180 days of the date of the act of discrimination.

Proposed regulations implementing the anti-discrimination provision were not published by the Justice Department until March 23, despite the fact that the provisions became effective upon enactment. The proposed regulations require proof that employers "knowingly and intentionally" discriminated despite the fact that the Act does not provide that such a standard applies in all cases.

Much of the sanctions-related discrimination may result from employer confusion, which might not be covered by the "knowing and intentional" standard. Such a standard would impose an extremely difficult burden of proof and would minimize the effectiveness of the system. Aliens who need to act affirmatively to be considered "intending citizens" have not been notified of this duty, and no mechanism for such aliens to declare such an intent has been established.

The coalition recommends that:

(1) **The Justice Department remove the "knowing and intentional" restriction from the proposed regulations;**

(2) **The Justice Department immediately establish an Office of Special Counsel, and the 180-day charge period not begin until the system is functioning;**

(3) **The INS immediately notify all aliens of their need to act affirmatively to become "intending citizens," and establish simple procedures for doing so. Time limits for taking action to be considered an "intending citizen" should not begin until notice has been given and procedures established.**

III. PUBLIC EDUCATION CAMPAIGN

The INS was to have awarded a multi-million dollar contract in February to for a massive outreach and public education campaign. The campaign is designed to inform employers of their obligations under the Act, explain the legalization provision to the undocumented population and encourage eligible persons to apply for the program, and to provide a range of information about the law to the general public. To date, the contract has not been awarded.

There is widespread confusion among employers about their obligations under the new law. Many are "playing it safe" and firing or refusing to hire persons suspected of being undocumented. Others may be engaging in selective practices or uniform practices that have disparate impact on certain nationality groups, i.e., "passports only" policies or "Speak English Only" rules. Many persons authorized to work — including certain "derivatively" naturalized citizens, natives of Puerto Rico (U.S. citizens by birth), and citizens born outside of hospitals — may not have access to documents proving work eligibility Others do not know of their burden to provide documents when seeking work. The result is that many otherwise eligible legalization applicants may be denied work at a time when employment is a prerequisite to legalization. Citizens and legal residents may be denied jobs because of employer confusion, discrimination, or lack of knowledge of or access to required documents.

Given changing regulations and widely divergent interpretations of such rules, there is widespread misunderstanding of legalization by the undocumented. Many such persons may be deterred from applying for the program. It is now virtually certain that legalization and sanctions enforcement will begin before the public education program starts.

> The coalition recommends that **INS immediately implement major public education efforts to clarify employers' responsibilities under the Act, discourage discrimination, inform the public of the documents needed to prove work eligibility, and to encourage the target population to apply for legalization.**

IV. SPECIAL AGRICULTURAL WORKERS

An analysis of the proposed regulations implementing the Special Agricultural Workers (SAWs) program is being prepared by the Farmworker Justice Fund. Please contact the Fund directly for information about the SAWs program.

APPENDIX 5

AMERICAN IMMIGRATION LAWYERS ASSOCIATION
AN AFFILIATED ORGANIZATION OF THE AMERICAN BAR ASSOCIATION

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April 8, 1987

The Honorable Edward M. Kennedy
Subcommittee on Immigration &
Refugee Policy
Attn: Jerry M. Tinker
518 Senate Dirksen Office Building
Washington, DC 20510

Re: Immigration Reform and Control Act of 1986
INS Oversight

Dear Senator Kennedy:

In anticipation of your oversight hearing this week, AILA would like to bring to your attention several serious concerns about the implementation of the Immigration Reform and Control Act of 1986.

NONIMMIGRANTS WHOSE UNLAWFUL STATUS WAS "KNOWN TO THE GOVERNMENT"

AILA shares with most other interested organizations and several members of Congress a concern over the restrictive definition of "known to the government" in the INS proposed regulations for unlawful residents who were nonimmigrants. While the INS has lengthened the definition of "known to the government" in the proposed regulations, in reality there was no meaningful change. Aliens who entered the U.S. as nonimmigrants should not be permitted to invent or contrive "unlawful status." However, those who can prove their eligibility with evidence held by a federal government agency should be eligible and brought out of the shadows. It is difficult to conceive of many applicants who could qualify under the restrictive INS rules, which require factors not relevant to preventing fraud or promoting the goals of legalization.

RE-ENTRIES DURING "CONTINUOUS RESIDENCE"

While INS is to be commended for making provision for Mexican and Canadian border crossers whose entries during continuous residence were not documented on a form I-94, it nevertheless leaves out a substantial number of aliens who re-entered the U.S. on improperly obtained visas to resume unlawful permanent residences. The essential question is that of unlawful residence in the U.S.; whether the alien's status was documented on a form I-94 is irrelevant and should not decide who will or will not qualify for legalization.

PHYSICAL PRESENCE -- ABSENCES AFTER NOVEMBER 6, 1986

INS is taking the position that such persons who have departed and reentered the U.S. after November 6, 1986, (the date of enactment of the Immigration Reform and Control Act of 1986) are automatically barred from legalization unless their departure and re-entry were authorized by INS. The new immigration law allows for absences since enactment that are "brief, casual and innocent" (INA Sec. 245A); and there is a legitimate need to prevent a feared "run" on the border by persons who would seek now to enter the U.S. to attempt to qualify for legalization. There is no basis in the legislative history, however, to justify total ineligibility for legalization because of any such absences, and AILA believes that such a tortured reading of the statute is unnecessary and should not pass unchallenged.

FAMILY MEMBERS INELIGIBLE FOR LEGALIZATION

Another pressing concern is that of treatment of immediate family members of legalization applicants who do not themselves qualify for legalization. As you know, there was no express provision made for such persons in the immigration reform act. However, INS should be encouraged to express a uniform national policy of granting relief from deportation ("docket control") under current law on generous case-by-case basis at the local level.

DOCUMENTATION OF ELIGIBILITY

A third concern is that of the documentation required to sustain a legalization application. The proposed regulations issued by INS, while improved in several ways over the earlier draft, remain ambiguous and in part contradictory. They are subject to misinterpretation and rigid application due to the categorical manner in which possible documentary proof is listed. We suggest that a strong message be sent that Congressional intent was to permit legalization with the minimum documentation necessary to deter and prevent fraud.

Your continuing attention to the implementation of the immigration reform act and to these vital issues is greatly appreciated.

Sincerely,

Warren R. Leiden
Executive Director

WRL:jp

SR105